129-141

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 722.

WALTER H. STOUTENBURGH, INTENDANT OF THE WASHINGTON ASYLUM, PLAINTIFF IN ERROR,

vs.

WILLIAM J. HENNICK.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED SEPTEMBER 29, 1887.

accession 23871

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JUDD & DETWEILER, PRINTERS, WASHINGTON, DECEMBER 10, 1888.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court, before you, between William J. Hennick, petitioner (for *habeas corpus*), and Walter H. Stoutenburgh, intendant of the Washington Asylum, defendant, a manifest error hath happened, to the great damage of the said Walter H. Stoutenburgh, as by his complaint appears, and it being fit that the error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 10th day of May, in the year of our Lord 1887, and of the Independence of the United States the 111th.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *To wit:*

To William J. Hennick:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein Walter H. Stoutenburgh is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected so that speedy justice be done the parties in that behalf.

Witness E. F. Bingham, chief justice of the said supreme court of the District of Columbia.

____ ____,
____ ____.

Service acknowledged this 4 day of June, 1887.

FRANCIS MILLER,
Att'y for Petitioner.

2 In the Supreme Court of the District of Columbia.

In the Matter of the Petition of WILLIAM HENNICK for Writ of *Habeas Corpus.*

The petition of William J. Hennick respectfully represents that—

He is a resident of the city of Baltimore and a citizen of the State of Maryland; that on the 15th day of April, 1887, he was engaged in the city of Washington, in the District of Columbia, in the prosecution of his business as the agent of Lyon, Conklin & Co., of the city of Baltimore, by offering for sale to the merchants of the city of Washington, in said District, by sample and catalogue, goods of the said Lyon, Conklin & Co., which at that time were in the said city of Baltimore, Md., and which, if so sold by him, were to be forwarded from the said city of Baltimore to the said merchants in the city of Washington, D. C.; that while he was thus engaged in his lawful business he was arrested by warrant issued out of the police court for said District, charging him with a violation of an alleged law of said District passed by the Legislative Assembly of said District on the 23rd day of August, 1871, as amended on the 20th day of June, 1872, entitled "An act imposing a license on trades, business, and professions practiced or carried on in the District of Columbia," by so offering said goods for sale as aforesaid.

Your petitioner further represents that on the said 15th day of April, 1887, he was taken under arrest as aforesaid before said
3 police court and was there tried for the alleged offence of carrying on the business of a commercial agent without having obtained a license so to do; that he thereupon interposed a plea to the jurisdiction of said court, which was overruled, and the said court proceeded to the trial of said cause on information therein duly filed, and your petitioner was found guilty of said alleged offence and was fined the sum of $205, and upon his declining to pay the said fine he was placed in the custody of the intendant of the Washington Aslyum, in which custody your petitioner now is.

Your petitioner is advised and believes that his arrest as aforesaid, his trial, and the present restraint of his liberty by the judgment of said court is illegal, and that the said judgment is void and null because of a want of jurisdiction in said court to pass it upon and against him, as will appear by a copy of the record in the trial of said cause in the said police court, herewith filed.

And your petitioner prays this honorable court the benefit of a writ of *habeas corpus*, to be directed to the said intendant of the Washington Asylum, commanding him to have before this court, at a day and place to be named therein, the body of your petitioner, together with a statement of the cause of his arrest and detention, to undergo and receive whatsoever your honorable court shall then and there consider of him in that behalf.

And your petitioner will ever pray, &c.

WM. J. HENNICK.

Subscribed and sworn to before me this 15th day of April, 1887.
HOWARD L. PRINCE,
Clerk Police Court, D. C.

4 (Endorsements:) 16625, crim. Petition of William J. Hennick for a writ of *habeas corpus*. Clerk will please file. Francis Miller, Guion Miller, attorneys for petitioner. Let the writ issue, returnable before me at 10 o'clock a. m. to-morrow, before me at the crim. court-room. A. B. Hagner. April 15, 1887. This case respectfully certified to be heard in the first instance in the general term. A. B. Hagner, asso. justice. April 16, 1887.

5 DISTRICT OF COLUMBIA, *To wit:*

The President of the United States to the intendant of the Washington Asylum, Greeting:

You are hereby commanded to have the body of William J. Hennick, detained under your custody, as it is said, together with the day and cause of his being taken and detained, by whatever name he may be called in the same, before the Honorable A. B. Hagner, one of the justices of the supreme court of the said District, at the criminal court room, United States court-house, Washington city (on the 16th day of April, 1887, at 10 o'clock a. m.), after the receipt of this writ, to do and receive whatever shall then and there be considered of in this behalf, and have then there this writ.

Witness D. K. Cartter, chief justice of said supreme court, the 15th day of April, 1887.

R. J. MEIGS, *Clerk*,
By W. E. WILLIAMS,
Ass't Clerk.

(Endorsed:) No. 16625. *In re* William J. Hennick. Writ of *habeas corpus*. Issued April 15th, 1887. Returned April 15th, 1887. April 15th, 1887. Service acknowledged. H. E. Davis, att'y for respondent.

6 DISTRICT OF COLUMBIA, *ss:*

In the Police Court of the District of Columbia.

James E. Padgett, Esq., special assistant attorney for the District of Columbia, who for the said District prosecutes in this behalf in his proper person, comes here into court and causes the court to be informed and complains that William Hennick, late of the District aforesaid, on the fourteenth day of April, in the year A. D. one thousand eight hundred and eighty-seven, and on divers other days and times between the said fourteenth day of April and the sixteenth day of April, in the year one thousand eight hundred and eighty-seven, in the city of Washington and in the District aforesaid, did engage in the business of a commercial agent, to wit, the business of offering for sale, as agent of Lyons, Conklin and Company, a firm

doing business in the city of Baltimore, State of Maryland, certain goods, wares, and merchandise by sample, catalogue, and otherwise without having first obtained a license to do so, contrary to and in violation of an act of the late Legislative Assembly of the District of Columbia, entitled "An act imposing a license on trades, business, and professions practiced or carried on in the District of Columbia," and providing for the enforcement and collection of fines and penalties for carrying on business in the said District without license, approved August 23, A. D. 1871, and the amendments to the said act, approved June 20, A. D. 1872.

7 JAMES E. PADGETT,
Special Assistant Attorney for the District of Columbia.

Personally appeared Edward Horne this 15 day of April, A. D. 1887, and made oath before me that the facts set forth in the foregoing information are true.

[SEAL.] JOSEPH HARPER,
Dep. Clerk of the Police Court of the District of Columbia, Acting in Absence of Clerk.

(Endorsements:) No. 58111. Information. District of Columbia *vs.* William Hennick, commercial agent, unlicensed. Witnesses: Edward Horne, def't. Filed April 15, 1887. Howard L. Prince, clerk police court, D. C. Filed May 4, 1887. R. J. Meigs, clerk.

8 *Information for Unlicensed Commercial Agent.*

In the Police Court of the District of Columbia. April Term, 1887.

DISTRICT OF COLUMBIA
vs.
WILLIAM HENNICK. } No. 58111.

Defendant arraigned Friday, April 15, 1887.
Plea: Not guilty.
Judgment: Guilty.
Sentence: To pay a fine of five dollars, in addition to the license tax of two hundred dollars, and, in default, to be committed to the work-house for the term of sixty days com.

APRIL 22, 1887.

I hereby certify, under the seal of this court, that the foregoing is a true copy of the record of the proceedings had in the police court in the above-entitled case and of the original information and commitment on file in said court.

[SEAL.] HOWARD L. PRINCE,
Clerk Police Court, Dist. of Columbia.

(Endorsements:) 16625, crim. Record of proceedings in police court in case of Wm. J. Hennick for a writ of *habeas corpus*. Clerk will please file. Francis Miller, Guion Miller, attorneys for petitioner. Filed May 4, 1887. R. J. Meigs, clerk.

9 DISTRICT OF COLUMBIA, } ss:
County of Washington, }

In the Police Court of the District of Columbia.

To the intendant of the Washington work-house, in the District of Columbia:

Receive into your custody the body of William Hennick herewith sent by the police court, brought before said court charged upon the oath of Edward Horne with being an unlicensed commercial agent and being convicted and sentenced to pay a fine of five dollars, in addition to the license tax of two hundred dollars, and in default of payment of said fine and license tax to be committed to said work-house for sixty days; and, being in default, him therefore safely keep in your said custody until he shall be discharged by due course of law, and for so doing this shall be your sufficient warrant.

Witness the Hon. William B. Snell, judge of the police court of the District of Columbia, and seal of said court this fifteenth day of April, in the year of our Lord one thousand eight hundred and eighty-seven.

[SEAL.] (Signed) HOWARD L. PRINCE,
Clerk of Police Court, D. C.

10 *Petition for Writ of Habeas Corpus.*

In the Supreme Court of the District of Columbia.

In Re WILLIAM J. HENNICK. At Law. No. 16625, Crim. Dock.

Return of respondent.

And now comes the respondent, and for return to the writ herein issued respectfully represents and shows—

That he is the intendant of the Washington Asylum designated in the said petition; that he has in his custody and now produces here in court the body of the said petitioner, William J. Hennick, who is in his, the said respondent's, custody by virtue of the commitment of the police court of the District of Columbia of the 15 day of April, 1887, a true copy whereof is with the said petitioner filed, and he hereby tenders himself ready to obey and conform to the order of the court in the premises.

W. H. STOUTENBURGH.

H. E. DAVIS,
Attorney for Respondent.

Subscribed and sworn to before me this the 4 day of May, 1887.
R. J. MEIGS, *Clerk,*
By J. R. YOUNG, *Ass't Clerk.*

(Endorsement:) At law. No. 16625, crim. docket. *In re* William J. Hennick. Return of respondent. Please file. H. E. Davis, att'y for respondent. Filed May 4, 1887. R. J. Meigs, clerk.

11 In the Supreme Court of the District of Columbia. In General Term.

In Re HENNICK, *Habeas Corpus.* 16625, Crim. Dock.

This cause coming on to be heard in the general term in the first instance, as ordered by Justice Hagner by order dated April 15th, 1887, after argument of counsel and due consideration thereof, it appearing to the court that the law for the violation of which the petitioner is held is not a valid law, it is, this 9th day of May, 1887, ordered that the petitioner be discharged from the custody of the respondent, W. H. Stoutenberg, as intendant of the Washington Asylum.

WM. M. MERRICK, *A. J.*

(Endorsed:) *In re* Hennick, *habeas corpus.* Order discharging the petitioner. 5 M. G. T., fo. 555. Filed May 9, 1887. R. J. Meigs, clerk.

12 DISTRICT OF COLUMBIA, *To wit:*

The President of the United States to the intendant of the Washington Asylum, Greeting:

You are hereby commanded to have the body of William J. Hennick, detained under your custody, as it is said, together with the day and cause of his being taken and detained, by whatever name he may be called in the same, before the Honorable A. B. Hagner, one of the justices of the supreme court of the said District, at the criminal court room, United States court-house, Washington city (on the 16th day of April, 1887, at 10 o'clock a. m.), after the receipt of this writ, to do and receive whatever shall then and there be considered of in this behalf, and have then there this writ.

Witness D. K. Cartter, chief justice of said supreme court, the 15th day of April, 1887.

R. J. MEIGS, *Clerk,*
By W. E. WILLIAMS, *Ass't Clerk.*

(Endorsed:) No. 16625. *In re* William J. Hennick. Writ of *habeas corpus.* Issued ——, 18—; returned ——, 18—. Filed May 4, 1887. R. J. Meigs, clerk.

13 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 15 day of Sept., 1887.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR.,
Assistant Clerk.

Justice's Certificate.

I, E. F. Bingham, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 15 day of Sept., 1887.

E. F. BINGHAM, [SEAL.]
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, R. J. Meigs, clerk of said court, hereby certify that E. F. Bingham, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 15 day of Sept., 1887.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR.,
Assistant Clerk.

[Endorsed:] Authentication of record.

Endorsed on cover: District of Columbia supreme court. No. 722. Walter H. Stoutenburgh, intendant of the Washington Asylum, plaintiff in error, *vs.* William J. Hennick. Filed September 29, 1887.

Office Supreme Court U. S.
FILED.
DEC 17 1888
JAMES. H. McKENNEY.
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1888.

No. 722.

WALTER H. STOUTENBURGH, PLAINTIFF IN ERROR,

vs.

WILLIAM J. HENNICK.

BRIEF FOR THE PLAINTIFF IN ERROR.

HENRY E. DAVIS,
For the Plaintiff in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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vs.

WILLIAM J. HENNICK.

BRIEF FOR THE PLAINTIFF IN ERROR.

HENRY E. DAVIS,
For the Plaintiff in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1888.

No. 722.

WALTER H. STOUTENBURGH, PLAINTIFF IN ERROR,

vs.

WILLIAM J. HENNICK.

BRIEF FOR THE PLAINTIFF IN ERROR.

I.

STATEMENT OF THE CASE.

This cause originated in the supreme court of the District of Columbia by a petition of the defendant in error for a writ of *habeas corpus*.

The defendant in error, a "commercial agent," or "drummer," was taken into custody for violation of an act passed by the late Legislative Assembly of the District of Columbia on August 23, 1871 (Acts 1st Assembly, 87), and amended by that body on June 20, 1872 (Acts 2d Assembly, 60), imposing a license on trades, business, and professions practiced or carried on in the District of Columbia.

The original act consists of twenty-four sections, of which the twenty-first is subdivided into forty-eight clauses. Clause 3, of section 21 (p. 93), defines a "commercial agent,"

within which definition the petitioner falls, and prescribes the tax to be paid by such. The penalty for failure to pay the tax is prescribed by section 4 (p. 88), viz., from five to fifty dollars, in addition to the amount of the tax.

By the amendatory act, clause 3, of section 21 of the original is stricken out and a substitution is made therefor (p. 62), but no change in effect is thereby made so far as concerns the questions herein involved.

As amended the clause in question reads as follows:

"Commercial agents shall pay two hundred dollars annually. Every person whose business it is, *as agent*, to offer for sale goods, wares or merchandise by sample, catalogue or otherwise, shall be regarded as a commercial agent."

The defendant in error, having been prosecuted under this section, was convicted and, in default of payment of the fine imposed, committed to the custody of the plaintiff in error, the lawful officer in that behalf. Thereupon he sued out a petition for the writ of *habeas corpus*, on the ground that the legislation in question is unconstitutional and void (Rec., 2). The court below held with the defendant in error and discharged him. The court's opinion is annexed hereto.

II.

ASSIGNMENT OF ERROR.

The court below erred:

1. In holding the legislation in question unconstitutional and void.

2. In holding the commitment of the defendant in error illegal and void.

3. In discharging the defendant in error from custody.

4. In granting the prayer of the petition of the defendant in error.

III.

ARGUMENT.

1.—*The Law is, in Effect, a Law of Congress.*

The power of the Legislative Assembly, which emanated from Congress, extended "to all rightful subjects of legislation within the District consistent with the Constitution of the United States . . . subject to all the restrictions and limitations imposed upon States by the tenth section of the first article of the Constitution of the United States," and all acts of the Assembly were "subject to repeal or modification by the Congress of the United States." (R. S., D. C., secs. 49, 50.)

The extent of the power thus conferred upon the Legislative Assembly was considered by the supreme court of the District of Columbia in Roach *vs.* Van Riswick, (McA. and M., 171;) Cooper *vs.* District of Columbia, (McA. & M., 250,) and District of Columbia *vs.* Waggaman, (4 Mack., 328); and in the last-mentioned case the very license act under consideration was held as within the power; and in District *vs.* Oyster, (4 Mack., 285), the act was administered by the same court without any question or expression of doubt as to its being properly within the power granted and properly grantable by Congress to the Assembly.

The act having, then, been within the power of the Assembly to pass, it was in full force and virtue from its passage, unless repealed or modified by Congress. As was said by the court in Roach *vs.* Van Riswick, (McA. and M., pp. 172–'3,) the "reluctance on the part of bench and bar to recognize the legislation of the late government as valid, . . . has sometimes sought its excuse in the want of positive confirmation by Congress of the legislation in question. This, however, is a very unsatisfactory foundation for

it. The organic act, . . . which established the District government, nowhere contains an intimation that the acts of the new government are to be inoperative until or unless confirmed by Congress; but, on the contrary, by the strongest implication, excludes such idea. The 50th section [of the revision] declares that all acts of the Legislative Assembly shall at all times be subject to *repeal* or *modification* by the Congress of the United States. Until repealed or modified, the clear implication is that they are to operate *proprio vigore*. . . . It is plain to us that as far as Congress could confer the power of original and independent legislation, needing no confirmation, but complete and operative in itself, it has done so by the act in question."

The effect of this is that the legislation in question, being that of a duly authorized and qualified agent of Congress in the government of the District of Columbia, is that of Congress itself. And if that be not so, we have a distinct adoption by Congress of this legislation in the several acts of February 17, 1873 (17 Stats., 464), July 12, 1876 (sec. 19, 19 Stats., 83), and January 26, 1887 (24 Stat., 368), in part amending and in part repealing the act of the Assembly; whereby, by the clearest implication, the rest of the act is adopted.

2.—*The Constitutional Question.*

The question raised by the petition is supposed to find support in article I, section 8, of the Constitution of the United States, which provides that "The Congress shall have power to lay and collect taxes, duties, imposts, and excises, . . . but all duties, imposts, and excises shall be uniform throughout the United States" (clause 1), and that "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several States, and with the Indian tribes" (clause 3); and in section 9 of the same article, which declares that "No preference shall be given by any regulation of commerce or revenue to the ports of one

State over those of another; nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another" (clause 6).

As to the first of these provisions, it is enough to say that the license-tax in question is not a duty, an impost, or an excise, and is not, therefore, within that provision requiring uniformity throughout the United States. As to the last, (section 9, clause 6), the license-law for the District of Columbia gives no preference to the ports of any State, or even of the District, over those of any other State, and it is not easily conceived how that clause can be thought to have any relevancy to the subject in hand.

A question seems, however, to be presented by the remaining of the three clauses above enumerated, viz., whether, as a regulation of commerce, the license-law for the District is invalid, as obnoxious to the Constitution of the United States.

a. Whether the law regulates commerce, in the sense of the Constitution, is immaterial. Whether it does so regulate commerce may be determined by the following cases:

Robbins *vs.* Shelby Taxing District, 120 U. S., 489.
Corson *vs.* Maryland, 120 U. S., 505.
Fargo *vs.* Michigan, 121 U. S., 230.
Ouachita Packet Co. *vs.* Aiken, 121 U. S., 444.
Phila. St'm'p Co. *vs.* Pennsylvania, 122 U. S., 326.
W. U. Tel. Co. *vs.* Pendleton, 122 U. S., 347.
Bowman *vs.* Chic., &c., Co., 125 U. S., 465.
Ratterman *vs.* W. U. Tel. Co., 127 U. S., 411.
Leloup *vs.* Port of Mobile, 127 U. S., 640.

b. In any event it is certain that, as above pointed out, the law is, in effect, an enactment of Congress.

c. The question, then, becomes, Has Congress power under the Constitution to pass such a law?

If not, it must be either because such power is not granted, or is denied, to Congress by the Constitution.

The power is undoubtedly granted, in terms, by article I, section 8, clause 17, whereby Congress is given power "to exercise exclusive legislation in all cases whatsoever" over the District of Columbia As was said by Marshall, Ch. J., in Loughborough *vs.* Blake, 5 Wheat., p. 324: "On the extent of these terms, according to the common understanding of mankind, there can be no difference of opinion."

But it is contended that this broad grant is limited by the restrictions which the Constitution has imposed upon Congress. Granting this, what restriction of the Constitution upon the power of Congress affects the question under consideration? Petitioner's counsel cite but two such restrictions as of supposed applicability—that requiring uniformity of duties, imposts and excises, and that forbidding preference to the ports of one State over another; both of which have been noticed above.

Moreover, we have an explicit utterance of the Supreme Court of the United States, speaking by Chief Justice Marshall, on this subject. Touching the power to regulate commerce, that Court says (Gibbons *vs.* Ogden, 9 Wheat., pp. 196–7):

"This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. These are expressed in plain terms. . . . If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are in this as in many other instances,

as that, for example, of declaring war, the *sole restraints* on which they have relied to secure them from its abuse. They are the restraints on which the people must often rely solely in all representative governments."

What limitations, then, exist on the power of Congress in regulating commerce? Seemingly none, except those distinctly prescribed by the Constitution, which "are expressed in plain terms," and none of which applies to the case in hand.

The question thus recurs: Does the supposed regulation of commerce complained of emanate from Congress? And that it does is shown above. "Although Congress cannot enable a State to legislate, Congress may adopt the provisions of a State on any given subject;" *a fortiori* may it adopt the legislation of its own agency in the exercise of one of its undoubted powers. And the adoption by Congress of any given legislation "gives it the same validity as if its provisions had been specifically made by Congress." (*Id.*, p. 207.)

d. The recent decisions of the Supreme Court of the United States (Robbins *vs.* Taxing District, &c., *ubi supra*), in reality do not affect the question under consideration.

In those cases it was held only that given laws of the States concerned were invalid, as dealing with the subject of commerce, which, by the Constitution, was committed to Congress. The power of Congress, its extent and its limitations in the premises, were not under consideration.

e. The petitioner has no right to complain of the District license law. He is not a member of a foreign nation or an Indian tribe, and the law does not affect commerce "among the several States."

The District of Columbia is not a State, in the meaning of the Constitution.

Hepburn *vs.* Ellzey, 2 Cranch, 445.
New Orleans *vs.* Winter, 1 Wheat., 91.
Scott *vs.* Jones, 5 How., p. 377.
Barney *vs.* Baltimore, 6 Wall., p. 287.
R. R. Co. *vs.* Harris, 12 Wall., p. 86.

And in respect of regulating commerce there is in the Constitution no prohibition upon either Congress or any State to discriminate for or against the District, as between it and such or any State. "The sole restraints" against abuse in this respect are those mentioned by Chief Justice Marshall in Gibbons *vs.* Ogden; and disregard of those restraints can only be reached by counter-legislation; they cannot be affected by any action of the judiciary.

HENRY E. DAVIS,
For the Plaintiff in Error.

APPENDIX.

Supreme Court of the District of Columbia.

General Term.

In re Petition of W. J. HENNICK for a writ of *Habeas Corpus*.

Criminal Docket. No. 16625.

Decided May 9, 1887.

Justices Hagner, Cox, James, and Merrick sitting.

The act of the late Legislative Assembly of the District of Columbia imposing a license tax upon commercial agents or drummers whose business it is, as agents for non-resident manufacturers or wholesale dealers, to offer merchandise for sale, is unconstitutional and void as a restriction upon interstate commerce.

Mr. Justice Merrick delivered the opinion of the court:

I have been assigned to announce the opinion of the court in the case of William J. Hennick, certified into this court from the circuit.

The petitioner, as it appears by his petition, was convicted before the police court upon an information against him as a commercial agent or drummer, so called. The information states:

"That on the 14th day of April, 1887, at the city of Washington, he did engage in the business of a commercial agent, to wit, the business of offering for sale, as agent of Lyons, Conklin & Co., a firm doing business in the city of Baltimore, State of Maryland, certain goods, wares, and merchandise by sample, catalogue, and otherwise, without having first obtained a license to do so, contrary to the provisions of an act of the late Legislative Assembly."

Prior to the decision of the Supreme Court of the United States at its present term in the case of Robbins *vs.* Shelby County (Tennessee), there had been a very great diversity of opinion throughout the United States as to the power of a State to tax commercial agents who were transacting busi-

ness by selling goods by sample or by soliciting contracts for sale of goods owned by persons in other States than where the solicitation or sale was made. That diversity of opinion not only pervaded the legal profession, but, as it appears by this recent decision of the Supreme Court, it still existed in that tribunal. So that there is a complete justification for those who entertained that opinion and who urged the liability under such laws. By justification I mean justification up to the time that that decision was pronounced. That decision being pronounced, however, it is obligatory upon all other tribunals and upon all citizens of the United States. It is not obligatory upon the Supreme Court itself as a final adjudication, because it is liable to be reviewed by them and reversed by them if, in their better judgment hereafter, they should entertain a different opinion from that which has been expressed by themselves, because it is a well-defined rule, announced by that Court, that in constitutional questions the rule of *stare decisis* is not obligatory upon themselves. Constitutional questions are always open for revision by the Supreme Court itself, notwithstanding there may have been one or more decisions upon the subject. But, while open for revision by themselves, such decisions, until reversed by themselves, are obligatory upon all other tribunals, and demand implicit obedience from all citizens throughout this land.

In the case of Robbins *vs.* Shelby County it was decided that a State law imposing a tax upon commercial agents who solicited contracts for sale of property owned by citizens of another State was beyond the power of the State to enact or enforce; that it was in contravention of the constitutional provision that Congress should have the exclusive power of regulating commerce between the States; a tax upon commercial agents or drummers of one State soliciting business within another State being a tax upon interstate commerce.

It was said in argument that the decision did not cover the whole proposition, that it was limited only to discriminations which were made by the statute of Tennessee as against the citizens of other States, and that if the law had been equally as applicable to all travelers the decision would not cover it. But an inspection of that decision shows this to be a mistaken view of the subject. The court grasped the whole matter, discussed the whole matter fully, and they

decided the precise point as law, as will be seen from the following quotation from the decision:

"But to tax the sale of such goods or the offer to sell them before they are brought into the State is a very different thing, and seems to us clearly a tax on interstate commerce itself. It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers—those of Tennessee and those of other States; that all are taxed alike; but that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State. This was decided in the case of State freight-tax cases, 15 Wall., 232. The negotiation of sale of goods which are in another State for the purpose of introducing them into the State in which the negotiation is made is interstate commerce. A New Orleans merchant cannot be taxed there for ordering goods from London or New York, because in the one case it is an act of foreign and in the other an act of interstate commerce, both of which are subject to regulation by Congress alone." (Md. Law Record, May 14, 1887, p. 269.)

Thus it will be seen that they do not put their decision at all upon the question of discriminations between drummers within the State and drummers outside the State; but they say that no law which imposes upon the person soliciting sales for merchants outside of the State is admissible, because that is a regulation of interstate commerce.

In connection with that decision it is well to read an extract from the opinion of the Supreme Court of the United States in the case of Walling *vs.* The State of Michigan, in 116 U. S., p. 456, which is as follows:

"The subjects, indeed, upon which Congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character and admit and require uniformity of regulation, affecting alike all the States. Others are local or are mere aids to commerce and can only be properly regulated by provisions adapted to their special circumstances and localities. Of the former class may be mentioned all that portion of commerce with foreign countries or between the States which consists in the transportation, purchase, sale, and exchange of com-

modities. Here there can of necessity be only one system or plan of regulation, and that Congress alone can prescribe. Its non-action in such cases with respect to any particular commodity or mode of transportation is a declaration of its purpose that the commerce in that commodity or by that means of transportation shall be free. There would otherwise be no security against conflicting regulations of different States, each discriminating in favor of its own products and citizens and against the products and citizens of other States. And it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the States was to insure uniformity of regulation against conflicting and discriminating State legislation."

And further down, on page 457, it is said:

"And after an examination of the causes which led to the adoption of the Federal Constitution, one of the principal of which was the necessity for the regulation of commerce and the laying of imposts and duties by a single government, the court say: 'But whatever may be the motive for the tax, whether revenue, restriction, retaliation, or protection of domestic manufactures, it is equally a regulation of commerce and, in effect, an exercise of the power of laying duties on imports, and its exercise by the States is entirely at war with the spirit of the Constitution and would render vain and nugatory the power granted to Congress in relation to those subjects. Can any power more destructive to the union and harmony of the States be exercised than that of imposing discriminating taxes or duties on imports from other States? Whatever may be the motive for such taxes, they cannot fail to beget irritation and lead to retaliation; and it is not difficult to foresee that an indulgence in such a course of legislation must inflame and produce a state of feeling that would seek its gratification in any measures regardless of the consequences.'"

Such is the declaration of the Supreme Court of the United States of the spirit and scope of these constitutional provisions: That they are necessary to the harmony and repose of the States; that they are necessary to the equal justice and equal privileges of the citizens of all the States of this Union; that they cannot be restricted at all, and that whatever rule is made with reference to them must be a uniform rule by the Congress of the United States, acting as the

National Legislature, regulating and controlling the commerce of the entire domain of the United States, with a view to do equal and exact justice between all the parts of the country and to take away any possibility of prejudice or any suggestion of injustice or discrimination by one as against another. That being so, it is manifest that any regulation upon this subject must be a regulation by Congress in its capacity as the National Legislature.

Now, could Congress, if it had been so disposed, have delegated to the Legislative Assembly of this District the power to pass any such law? That is not an open question in this court. In the case of the District *vs.* Waggaman (4 Mackey, 333) this court said:

"In Roach *vs.* Van Riswick, 7 Wash. Law Rep., 496, this court held that the very broad terms in which the organic act of 1870 granted legislative powers to the Legislative Assembly had the effect to clothe that body with only such powers as might be given to a municipal corporation, and that it was not competent for Congress to delegate the larger powers of general legislation which it had itself received from the Constitution."

We have already shown by these extracts that this subject-matter belongs to the larger power of general legislation, belongs to Congress as the legislature of the Nation. It could not, therefore, within this announcement delegate any such part of its general legislative power to a municipal legislative body. It is altogether outside the scope of a municipal body to legislate on this subject. It would be marvelous, indeed, if, when the Constitution strips all the States of this Union of power to legislate on this subject, it could be pretended that a municipal body could be clothed with any such faculty. If a State cannot do it, how can a body inferior to a State do it? How can it be said to be within the power of a municipal corporation, when it is not within the power of a sovereign State, to legislate upon this subject-matter? It would seem sufficient to stop at this point.

But it has been said here in argument that, the Congress of the United States having the exclusive legislative power of this District of Columbia, there is no restriction upon its capacity to act as such Legislature. If the question were sefore the court in that aspect it would not be difficult to bay that it is a proposition that cannot be entertained by any who regard the comprehensive power of the Constitution, the

object for which it was formed, or the purposes for which this District of Columbia was dedicated to national uses, to maintain that a body may be established here in legislative form in antagonism to the rights of the various States of this Union. This community is not even a State. It is an organized body, to be legislated over by Congress alone. This District has surrendered its right of representation, and that representation is vested in Congress, but still it is vested in Congress as the National Legislature, and it is to be exercised by Congress in subordination to the principles of the Constitution of the United States. The argument, pushed to its extreme, would simply be this: Congress is without constitutional restraint as to this District. The people are helpless and not under the sanctions or protection of the Constitution of the United States at all. The United States has here a foreign territory, in which it can legislate in antagonism to the interests of the States and in opposition to the policy which prevails in the Constitution, obligatory upon the States in their intercourse with one another to do equal and exact justice, one as to the other and each as to all. Such an argument cannot have any sanction at the hands of this court. This District is set aside and dedicated to the uses of the Nation, and if there be anywhere on the face of the earth a locality where no discrimination should be made as against the rights of any of the States or any citizens of the United States it should be upon this soil, where all are equal, on which each citizen has an equal right, and in which each State has an equal right as regards all the other States and as regards the United States itself. This territory is dedicated simply as a temple of justice, as a temple where the liberties of the Nation are to be sacredly preserved, and it is for that purpose that it should be exempt from hostile control or the possibility of antagonism with the purposes of the Union. Congress was vested with the power of exclusive legislation for this District, but not at all for the purpose of enabling it to legislate in any manner in hostility to the rights of any of the States of the Union. Can it be supposed for an instant that any of the States would have ceded to the Government of the United States a district for the seat of its government in which hostile legislation should be exercised towards the interests of the citizens of those States or the citizens of their sister States? We cannot suppose such a thing possible.

We cannot suppose that when the Congress was vested with power to legislate over this District it was clothed with any power to act as such legislature in hostility to the rights of the States, or to do anything regarding the interests of the citizens of one State which any State of the Union could not do with regard to the citizens of any other State. We are subject to the Constitution of the United States. Here, if anywhere, the Constitution should be venerated, and the most sedulous regard should be had for each and all of its provisions, and we should rejoice that we are under its protection. We should rejoice that we are set apart for the purpose of ministering at the temple of justice, the temple of "Equality of Laws," which has been established in our midst.

It seems impossible, therefore, to argue from the fact that Congress has exclusive legislation over this District that it has the power of the tyrant through this District over the States of the Union. The whole idea is utterly inconsistent with the spirit of our institutions, utterly inconsistent with the object for which the Constitution was formed and for which this District or county was set apart for the uses of the General Government. Therefore, even if Congress had undertaken, with regard to this District, in its general capacity as the legislature for the District, to pass such a law it would have been outside the power of Congress so to do, because as a national legislature it can only legislate under the commercial power upon the principle of uniformity, which is to pass laws equally operative upon any, every, and all parts of the Union, and therefore any discrimination in favor of this community would be in violation of the spirit if not the letter of the Constitution of the United States.

But we need not go that far for the purposes of this case. It was only necessary to speak to it for the purpose of repealing the argument and making it be seen how we regard the relations of this community to the legislative power of Congress and to the several States of the Union. It is enough for the purposes of this cause to say that the delegated power to the Legislative Assembly of this District was the delegation only of municipal power, and that any attempt to legislate in this repect is *ultra vires*. A municipality, as it is, is *ultra vires* the power of a State of this Union.

For these reasons the court is of opinion that the prosecution was without authority; that, so far as this law operates

on this class of cases, it is null and void, and that the prisoner must be discharged from custody.

But it is necessary to add that this decision on this branch of the law is not at all inconsistent with the decision that was made in the case of Waggaman, where it was held that the Legislative Assembly was empowered to impose a license tax upon the people doing business within the District of Columbia. All occupations which are limited to the District of Columbia are subject to the taxing power. That is what was held in that case, and there is nothing in this case at all inconsistent with it. If this party had taken out a license for the District for the purpose of soliciting business within the District for sales by people within the District he might have been subject and would have been subject to the license law; but upon the face of this information it appears affirmatively that his exclusive business was to act as the agent of citizens of other States, soliciting contracts of sale for goods within those States thereafter to be brought under the dominion and within the control of the taxing power of the District. Therefore there is no inconsistency between the two decisions. They are entirely harmonious, and there can be no difficulty in maintaining that in the aspect in which this case is presented it is directly in the face of the decision in Robbins *vs.* The County of Shelby, directly in opposition to the whole current of decisions upon the commercial power of the United States as expounded by the Supreme Court of the United States, and cannot be permitted to stand at law.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 722.

STOUTENBERG, *Intendant*, &c.,

vs.

HENNICK.

WRIT OF ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Brief for Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 722.

STOUTENBERG, &c., PLAINTIFF IN ERROR,

vs.

HENNICK, DEFENDANT IN ERROR.

WRIT OF ERROR FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR DEFENDANT IN ERROR.

Defendant was convicted by the Police Court of the District for violation of Section 21, Acts of Legislative Assembly of 1871, Session 1, page 93, as follows:

"That every person residing in the District of Columbia, whose business it is, as agent for non-resident manufacturers or wholesale dealers to offer for sale merchandise, shall be regarded as commercial agents, pay a license of $250, etc."—Acts, Sess. 1, p. 93.

The facts alleged against Defendant in Error, were that he was engaged as agent for certain dealers, non-residents of the District, in offering for sale merchandise which was not located in the District, but sales of which located in some of the States, he was negotiating for such non-residents by sample and otherwise.

The District Supreme Court in discharging the appellee decided:

1. That Congress in the Acts creating the legislative authority of the District, had granted only municipal authority, and this did not authorize the law under which the Defendant in Error was convicted, and that the law was void.

2. That Congress in the exercise of its power of exclusive legislation over the District had no power to delegate any such authority. It is a regulation of Interstate commerce, and cannot be so delegated. Counsel for Defendant in Error consider this whole subject so covered by decisions of the Supreme Court that assistance of counsel, by extended argument, is not only not needed, but would be impertinent.

They can give no better reasons for the affirmance of the judgment below than to quote the language of the learned Court, which, sitting with a full bench, unanimously rendered:

"But to tax the sale of such goods, or the offer to sell them, before they are brought into the State, is a very different thing, and it seems to us clearly a tax on interstate commerce itself. It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers—those of Tennessee and those of other States; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State. This was decided in the case of State freight tax cases, 15 Wall, 232. The negotiation of sale of goods which are in another State for the purpose of introducing them into the State in which the negotiation is made is interstate commerce. A New Orleans merchant cannot be taxed there for ordering goods from London or New York, because in the one case it is an act of foreign, and in the other an act of interstate commerce, both of which are subject to regulation by Congress alone.

"Such is the declaration of the Supreme Court of the United States of the spirit and scope of these constitutional provisions: That they are necessary to the harmony and repose of the States; that they are necessary to the equal justice and equal privileges of the citizens of all the States of this Union; that they cannot be restricted at all; and that whatever rule is made with reference to them, must be a uniform rule by the Congress of the United States, acting as the National Legislature, regulating and controlling the commerce

of the entire domain of the United States, with a view to do equal and exact justice between all the parts of the country, and to take away any possibility of prejudice or any suggestion of injustice or discrimination by one as against another. That being so, it is manifest that any regulation upon this subject must be a regulation by Congress in its capacity as the national legislature.

"Congress was vested with the power of exclusive legislation for this District, but not at all for the purpose of enabling it to legislate in any manner in hostility to the rights of any of the States of the Union. Can it be supposed for an instant that any of the States would have ceded to the Government of the United States a district for the seat of its Government in which hostile legislation should be exercised toward the interests of the citizens of those States or the citizens of their sister States? We cannot suppose such a thing possible. We cannot suppose that when the Congress was vested with power to legislate over this District it was clothed with any power to act as such Legislature in hostility to the rights of the States, or to do anything regarding the interests of the citizens of one State which any State of the Union could not do with regard to the citizens of any other States. We are subject to the Constitution of the United States. Here, if anywhere, the Constitution should be venerated, and the most sedulous regard should be had for each and all of its provisions, and we should rejoice that we are under its protection; we should rejoice that we are set apart for the purpose of ministering at the temple of justice, the temple of 'Equality of Laws,' which has been established in our midst.

"It seems impossible, therefore, to argue from the fact that Congress has exclusive legislation over this District that it has the power of the tyrant through this District over the States of the Union. The whole idea is utterly inconsistent with the spirit of our institutions, utterly inconsistent with the object for which the Constitution was formed, and for which this District or county was set apart for the uses of the general Government. Therefore, even if Congress had undertaken, with regard to this District, in its general capacity as the Legislature for the District, to pass such a law, it would have been outside the power of Congress so to do, because, as a national Legislature, it can only legislate under the commercial power upon the principle of uniformity, which is to pass laws equally operative upon any, every and all parts of the Union, and therefore any discrimination in

favor of this community would be in violation of the spirit if not the letter of the Constitution of the United States.

"But we need not go that far for the purposes of this case. It was only necessary to speak of it for the purpose of repelling the argument, and making it be seen how we regard the relations of this community to the legislative power of Congress and to the several States of the Union.

"It could not, therefore, within this announcement, delegate any such part of its general legislative power and as regards the United States itself, this territory is dedicated simply as a temple of justice, as a temple where the liberties of the Nation are to be sacredly preserved; and it is for that purpose that it should be exempt from hostile control or the possibility of antagonism with the purposes of the Union. It is enough for the purposes of this cause to say that the delegated power to the legislative assembly of this District was the delegation only of municipal power, and that any attempt to legislate in this respect is *ultra vires*, a municipality as it is, *ultra vires* the power of a State of this Union.

"So far as this law operates it is null and void."

Whatever can be said of the power if exercised by Congress to tax sales or negotiation of sales in the District when made for or by non-residents, there is in this case no grant of power from Congress, except the general powers given to the Legislature of the District.

This is a grant of municipal power, and the Legislature cannot legislate on general subjects, nor could Congress so authorize it.

Roach vs. Van Riswick, 4 MacArthur, 171.
Cooper vs. District, 4 MacArthur, 250.
District vs. Waggaman, 4 Mackey, 333, Section 93, R. S. D. C.
Dunphy vs. Kleismidt, 11 Wallace, 610.
In Re. Hennick, 7 Central Reporter, 357.

If Congress had made it itself it would still be tax on the commerce of the States to support local expenses of the District, and this cannot be done.

Cooley, Con. at Law, 499.

A municipality can have no greater power than a State, and this Court has decided that a State has no such power.

Walling vs. Michigan, 116 U. S., 456.
Ex Parte Stockton, 33 Fed. Rep., 95.
Rollins vs. Shelby, 120 U. S., 489.

Fargo vs. Michigan, 121 U. S., 230.
Steamship Co. vs. Pa., 122 U. S., 326.
Robbins vs. Shelby Co., U. S.
The Interstate cases during the present term.

If a State cannot tax, Congress could not authorize the District to do so under the power to regulate commerce.

Such regulation must be equal and general, and under neither of powers of Congress, as exclusive legislature or as regulator of commerce, could it grant to such citizens or aliens as choose to conduct business in the District as residents thereof a monopoly of trade by taxing, restricting or prohibiting the citizens of the States of the Union in negotiating sales within the District.

That the common capital of the Union should have barriers erected not against enemies in arms, but against the citizens of the Union desiring lawful and beneficent trade, has long been a vexatious scandal.

Large numbers of such citizens desire so to trade, and have in the past been either debarred from so doing by this taxation which gave so great an advantage to the resident trader, who could freely buy his goods in any State and sell in the District without commercial agents, or they have been harassed by arrests, watched by detectives, or have paid large sums year after year under threat of fine and imprisonment.

The rights and interests of large numbers of citizen traders and manufacturers in many of the States, not less than the personal liberty of the Defendant in Error, are involved in this case.

And counsel urge that it should be advanced and heard at the present term, and this mischievous and illegal legislation and action at once stopped by the authoritative mandate of this Honorable Court.

FRANCIS M. DARBY,
SKIPWITH WILMER,
GUION MILLER,
JOHN HENRY KEENE, JR.
ARCHIBALD STIRLING,
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Counsel for Defendant in Error.

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Supreme Court of the United States.

OCTOBER TERM, 1888.

WALTER H. STOUTENBURGH, Intendant of the Washington Asylum, *Plaintiff in Error*,
vs.
WILLIAM J. HENNICK.
No. 722.

Brief in behalf of the Defendant in Error.

GUION MILLER,
For the Defendant in Error.

R. O. POLKINHORN, PRINTER, WASHINGTON.

Supreme Court of the United States.

OCTOBER TERM, 1888.

WALTER H. STOUTENBURGH, Intendant of the Washington Asylum, *Plaintiff in Error*,

vs.

WILLIAM J. HENNICK.

No. 722.

Brief in behalf of the Defendant in Error.

William J. Hennick, a citizen of Baltimore, in the State of Maryland, was engaged in business in Washington, D. C., as a commercial agent, or drummer, representing the Baltimore firm of Lyon, Conklin & Co. He was arrested and held in custody for an alleged violation of the act of the late Legislative Assembly of the District of Columbia, of August 23d, 1871, as amended by the act of June 20th, 1872, which provides that no person shall engage in the business of a commercial agent without first having taken out a license. After conviction the defendant sued out a writ of *habeas corpus*, and was discharged by the Supreme Court of the District of Columbia, the Court in General Term holding that the law was unconstitutional and void. From that decision this proceeding in error is brought.

This Court has expressly decided that a law im-

posing a license tax upon commercial agents, or drummers, selling goods, by sample or otherwise, for non-resident firms or business houses is a regulation of commerce.

Robbins vs. *Shelby County Taxing District*, 120 U. S., 489 ;

Asher vs. *Texas*. Decided October 29th, 1888.

These decisions further establish the fact that such a law enacted by a State Legislature is a regulation of *interstate* commerce, and is unconstitutional and void, being in conflict with Article I, Section 8, Clause 3 of the Constitution, which gives to Congress exclusive power to regulate commerce among the several States.

It is claimed, however, that these decisions are not applicable to this case, because the law under which this arrest was made was enacted by the Legislative Assembly of the District of Columbia, as the duly authorized agent of Congress, and was, therefore, in effect, the law of Congress.

We contend that the Legislative Assembly was not the agent of Congress for any such purpose ; that any attempt on its part to "*regulate commerce*" was *ultra vires*, and of no effect.

The Legislative Assembly, by the very terms of the organic act, was given only municipal powers.

> "The District is created a government by the name of the District of Columbia, by which name it is constituted *a body corporate for municipal purposes*, and may contract and be contracted with, sue and be sued, plead and be impleaded, have a seal, and exercise all other *powers of a municipal corporation not inconsist-*

ent with the Constitution and laws af the United States and the provisions of this title."

Section 2, *Revised Statutes of the District of Columbia.*

The Supreme Court of the District of Columbia has so construe dthis delegation of power.

Roach vs. *Van Riswick*, 4 MacArthur, 171;
District of Columbia vs. *Waggaman*, 4 Mackey, 328.

The principles governing this question have been fully settled by the decision in the case of *Cohens* vs. *Virginia*, 6 Wheat., 441. That was a case considering the extent of the grant of power by Congress to the Corporation of Washington. In delivering the opinion, Judge Marshall says:

> "In inquiring into the extent of the power granted to the corporation of Washington, we must first examine the words of the grant. We find in them no expression which looks beyond the limits of the city. The powers granted are all of them local in their nature, and all of them such as would, in the common course of things, if not necessarily, be exercised within the city. The subject on which Congress was employed when framing this act was a local subject, * * * the formation of a separate body for the management of the internal affairs of the city, for its internal government, for its police. Congress must have considered itself as delegating to this corporate body powers for these objects, *and for these objects solely.* In delegating these powers, therefore, it seems reasonable to suppose that the mind of the legislature was directed to the city alone, to the action of the being they were creating, within the city, and *not to*

> *any extra territorial operations.* In describing the powers of such a being, no words of limitation need be used. *They are limited by the subject.* But if it be intended to give its acts a binding efficacy beyond the natural limits of its power, *and within the jurisdiction of a distinct power*, we should expect to find in the language of the incorporating act some words indicating such intention. * * * * * *
>
> If this would be the reasonable construction of corporate powers generally, it is more especially proper in a case where an attempt is made so to exercise those powers as to control and limit the penal laws of a State."

Section 49 of the Revised Statutes of the District of Columbia, is as follows:

> "The legislative power of the District shall extend to all rightful subjects of legislation *within the District, consistent with the Constitution of the United States* and the provisions of this title, subject to all the restrictions and limitations imposed upon the States by the tenth section of the first article of the Constitution of the United States."

And section 93 provides:

> "The Constitution and all the laws of the United States which are not locally inapplicable shall have the same force and effect within the District as elsewhere within the United States."

In the face of these two provisions can it be successfully maintained for an instant, that Congress authorized a subordinate municipal government to pass a license tax law directly effecting the commerce of the States (as in the case at bar, the State of Mary-

land), when a Sovereign State is expressly prohibited from passing such a law by the terms of the Constitution? Is not that prohibition beyond all doubt equally applicable to the District of Columbia? Is not the reason for the inhibition as manifest?

This legislation is not confined in its operation to the District of Columbia. It is a tax levied for the support of the government of the District of Columbia, in this case upon the commerce of the State of Maryland. We have then a municipal government demanding tribute of a sovereign State. Such enactments are surely not within the scope of municipal powers as limited by the decision in *Cohens* vs. *Virginia*, cited above.

If the legislative assembly could pass this law, it could totally exclude the commerce of the States.

Brown vs. *Maryland*, 12 Wheat., p. 439.

We claim that Congress not only did not, but *could not* delegate to the Legislative Assembly any of its power to regulate commerce. This power belongs to it as the Legislature of the Nation, and Congress cannot abdicate its general national powers.

> "One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which

> the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust."
>
> Cooley's Constitutional Limitations, p. 116, citing numerous authorities.

In the case of *The District* vs. *Waggaman*, 4 Mackey, 333, the Supreme Court of the District of Columbia makes use of this language:

> "In *Roach* vs. *Van Riswick*, 4 MacArthur, 171, this Court held that the very broad terms in which the organic Act of 1870 granted powers to the Legislative Assembly had the effect to clothe that body with only such powers as might be given to a municipal corporation, *and that it was not competent for Congress to delegate the larger powers of general legislation which it had itself received from the Constitution.*"

If, then, Congress could not clothe the Legislative Assembly with this power, its action in passing this portion of the License Law was utterly void, and could not gain any validity from the tacit acquiescence of Congress.

The rule of "ratification" is laid down in the case of *Mattingly* vs. *The District of Columbia*, 97 U. S., 689.

Congress can only ratify an unauthorized action, when it can give authority to act.

Cooley's Constitutional Limitations, p. 371.

It is contended that Congress has adopted this legislation by its several acts in part amending and in part repealing the act of the Assembly. We sub-

mit that this position is untenable. The act in question contained many distinct provisions, most of which were proper subjects of the Assembly's legislation. Congress saw fit to modify some and repeal other of these legitimate provisions, without in any way acting upon those which were unauthorized and therefore void. This clearly would not give any validity to these provisions which they did not originally possess.

But even though Congress had formally passed this law, and it had been regularly approved by the President, with all the forms prescribed for the enactment of laws of the United States, we contend it would still be inoperative, because of its violation of the fundamental requirement of all such legislation, to wit: that of *uniformity throughout the limits of the country.*

Ex. *Bank of Columbus* vs. *Hine*, 3 Ohio St. 1;
Cited in *Gilman* vs. *Sheboygan*, 2 Black, 510.

True, Congress has been given exclusive jurisdiction over the District of Columbia in all cases whatsoever. But the term "exclusive jurisdiction simply designates Congress as the only law-making body, without indicating in the least what laws may be made," and the expression, "in all cases whatsoever, must be construed to mean all cases *in which any legislation is possible.*"

Pomeroy Constitutional Law, § 492.

And when Congress does act, it is as the National Legislature, and is subject to all the express or implied restrictions and limitations of the Constitution.

"In the enumeration of the powers of Congress, which is made in the 8th section of the first article, we find that of exercising exclusive legislation over such District as shall become the seat of Government. This power, like all others which are specified, is conferred on Congress as the legislature of the Union; for, strip them of that character, and they would not possess it. In no other character can it be exercised. In legislating for the District, they necessarily preserve the character of the legislature of the Union; for it is in that character alone that the Constitution confers on them this power of exclusive jurisdiction."

Cohens vs. *Virginia*, 6 Wheat., 424.

In legislating in regard to regulations of commerce among the States, as in the case of the constitutional provision as to direct taxes, the District of Columbia and the territories are to be included.

Gibbons vs. *Ogden*, 9 Wheat., 194–196.

All such regulations, therefore, must be uniform throughout the country. This law must either be impartially applied to every man who engages in the business of a drummer, or it cannot be enforced against any one.

The language of the Supreme Court on this subject —emphatic and oft repeated as it has been,—is but an expansion of that of the Constitution itself.

Art. 1, Sec. 8, clause 1 provides that, "All duties, imposts and excises shall be uniform throughout the United States."

Chief Justice Marshall, in the case of *Loughborough* vs. *Blake*, 5 Wheat., 319, says: "The power, then, to lay and collect duties, imposts, and excises,

may be exercised, *and must be exercised throughout the United States.* Does this term designate the whole, or any particular part of the American Empire? Certainly this question can admit of but one answer. It is the name given to our great republic which is composed of States and territories. *The District of Columbia*, or the territories west of the Missouri, is not less within the United States than Maryland or Pennsylvania, and it is not less necessary, on the principles of our Constitution, that uniformity of imposts, duties, and excises should be observed in one than in the other. Since then the power to lay and collect taxes is obviously co-extensive with the power to lay and collect duties, imposts and excises, and since the latter extends throughout the United States, it follows that the power to impose direct taxes also extends throughout the United States."

Article I Section 9, clause 6 of the Constitution provides that "No preference shall be given *by any regulation of commerce* or revenue to the ports of one State over those of another."

See *Gibbons* vs. *Ogden*, 9 Wheat., 191.
Passenger cases, 7 How., 405.

Now, if this License Law does give, or may give the city of Baltimore any preference over the city of Washington, or the reverse, it is in violation of this clause of the Constitution.

This license tax is, moreover, a tax on the articles to be sold by the drummer.

Brown vs. *Maryland*, 12 Wheat., 444, 448.
Cook vs. *Pennsylvania*, 97 U. S., 566.
License Tax Cases, 5 Wall., 462.
Wilson vs. *Missouri*, 91 U. S., 275.

And direct taxes must be laid by the rule of apportionment; *all others by the rule of uniformity.*

License Tax Cases, 5 Wall., 462.
Veazie Bank vs *Fenno*, 8 Wall., 533.
Scholey vs. *Rew*, 23 Wall., 331.
Cooley's Constitutional Limitations, p. 495.

But the particular point in question here is expressly covered by the opinion of Justice BRADLEY in the case of *Robbins* vs. *Shelby Connty Taxing District*, 120 U. S., 489. He says: "In a word, it may be said that *in the matter of interstate commerce the United States are but one country*, and are, and must be subject to one system of regulation, and not to a multitude of systems." And again, "If the selling of goods by sample, and the employment of drummers for that purpose, injuriously affect the local interests of the States, Congress, if applied to, will undoubtedly make such reasonable regulations as the case may demand. And Congress alone can do it; *for it is obvious that such regulations should be based on a uniform system applicable to the whole country*, and not left to the varied, discordant or retaliatory enactments of forty different States."

And, again, in the words of Justice BRADLEY, in the case of *Ward* vs. *Maryland*, 12 Wall., 418:

> "It will not be denied that that portion of commerce with foreign countries and between the States, which consists of the transportation and exchange of commodities, *is of national importance, and admits and requires uniformity of regulation.*"

See also *Welton* vs. *Missouri*, 91 U. S., 275.
Cited and approved in *Tiernan* vs. *Rinker*, 102 U. S., 128.

In respect of commerce among the States which consists of transportation, purchase, sale and exchange of commodities, "there can of necessity be only one system or plan of regulations, and that Congress alone can prescribe."

Mobile County vs. *Kimball*, 102 U. S., 691;
Ferry Co. vs. *Pennsylvania*, 114 U. S., 196;
Brown vs. *Houston*, 114 U. S., 622;
Walling vs. *Michigan*, 116 U. S., 446;
Pickard vs. *Pullman Co.*, 117 U. S., 34.

The whole theory of the Constitution is that all commercial regulations should be uniform. That there should be absolute freedom, within the United States, from every kind of local discrimination or restriction. One of the great defects of the Articles of Confederation was to be cured, and the language of the Constitution on this subject is broad. The States are to be allowed the freest intercourse, and no one State can discriminate against another. Congress itself is expressly restrained. "No tax or duty shall be laid on articles exported from any State," and "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another." The spirit of these restrictions, if not the letter, would surely cover this case.

That this law requiring a license tax places a restriction upon the commercial operations of the business firms of the State of Maryland is most certain. That it does, in effect, place a tax upon the articles intended to be shipped by those firms from the State of Maryland to the District of Columbia is equally clear. Does the Constitution of the United States contemplate any such legislation?

We confidently contend that it does not.

If Congress *is* granted this extraordinary power, we submit:

That it is confided to it only as the National Legislature, and is subject to the Constitutional restriction that all such legislation shall be uniform in its operation throughout the limits of the United States;

That in exercising this power, Congress is limited to the single method of enacting laws prescribed by the Constitution, and cannot make use of the instrumentality of a municipality created merely for local purposes;

That the grant by Congress of municipal powers to the District of Columbia did not confer upon the Legislative Assembly any of the National functions of Congress, and its action in thus attempting to restrict commerce between the States and the District of Columbia was absolutely void.

GUION MILLER,
For the Defendant in Error.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 862.

THE BATE REFRIGERATING COMPANY, APPELLANT,

vs.

GEORGE H. HAMMOND AND COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED OCTOBER 17, 1887.

We confidently contend that it does not.

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1 UNITED STATES OF AMERICA, }
Massachusetts District, } *ss:*

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Monday, the sixteenth day of May, in the year of our Lord one thousand eight hundred and eighty-seven, the fifteenth day of said May happening on a Sunday, before the Honorable Le Baron B. Colt, circuit judge.

BATE REFRIGERATING COMPANY, Complainant, }
v. } In Equity.
GEORGE H. HAMMOND AND COMPANY, Defendant, }

The bill of complaint in this cause was filed in the clerk's office on the sixteenth day of December, A. D. 1886, and was duly entered at the October term of this court, A. D. 1886, and is in the words and figures following:

Bill of Complaint. (*Filed Dec.* 16, 1886.)

To the honorable the judges of the circuit court of the United States in and for the district of Massachusetts:

The Bate Refrigerating Company, a corporation duly organized under the laws of the State of New York and a citizen of the
2 said State, having its principal place of business in the city of New York, in said State, brings this its bill of complaint against George H. Hammond and Company, a corporation duly organized under the laws of the State of Michigan and a citizen of the said State of Michigan and doing business through its managing agent, Nathaniel B. Plumer, and having a usual place of business at the city of Boston, in the State of Massachusetts, within said district.

And thereupon your orator complains and says that heretofore and before the 20th day of November, 1877, John J. Bate, being then a citizen of the United States, was the original and first inventor of a certain new and useful improvement in processes for preserving meats during transportation and storage, not known or used by others in this country and not patented or described in any printed publication in this or any foreign country before his invention or discovery thereof, and not in public use or on sale for more than two years prior to his application for a patent therefor.

And your orator further shows unto your honors that the said John J. Bate, so being the inventor of said improvement, made application to the Commissioner of Patents, in accordance with the then existing laws of the United States, and complied in all respects with the conditions and requirements of said laws.

And thereafter, on the 20th day of November, 1877, letters patent of the United States, numbered No. 197,314, signed, sealed, and exe-

cuted in due form of law, and bearing date the day and year last aforesaid, were issued to the said John J. Bate, whereby there was secured to him, the said John J. Bate, and to his heirs and
3 assigns, for the term of seventeen years from the 20th day of November, 1877, the full and exclusive right of making, using, and vending the said improvement throughout the United States and the territories thereof, as by a certified copy of said letters patent, in court to be produced, will more fully appear.

And your orator further shows that by an instrument in writing bearing date November 22nd, 1877, and duly recorded in the Patent Office of the United States, the said John J. Bate assigned, transferred, and set over unto the Bate Refrigerating Company, the complainant herein, all his right, title, and interest in and to the said letters patent and the invention thereby secured, the same being the full and entire right, title, and interest therein, as by the said instrument of assignment, with the certificate of recording thereto affixed, or by a duly authenticated copy of such instrument of assignment, ready in court to be produced, will more fully appear.

And your orator further shows that ever since the date of the said assignment it has been and now is entitled to all the rights, interests, and privileges thereby secured unto it in and to the invention in the said letters patent particularly set forth, and is now, and ever since the date of said assignment has been, entitled to the exclusive right of making, using, and vending the said invention.

And your orator further shows that on or about the 30th day of November, 1877, a final decree was issued by the United States circuit court for the southern district of New York in a suit in equity, in which your orator was complainant and Charles Snowden and Patrick McConville, comprising the firm of Snowden &
4 McConville, were defendants, in which decree it was ordered, adjudged, and decreed that the aforesaid letters patent are good and valid in law.

And your orator further says that in pursuance of said decree an injunction was issued in the said suit perpetually enjoining the defendants therein and their attorneys, clerks, agents, and workmen from using the process set forth in the said letters patent, or any other process substantially the same.

And your orator further shows that on or about the 14th day of November, 1881, and after a full hearing of the parties, an interlocutory decree was issued out of and by the United States circuit court for the district of New Jersey in a suit in equity brought by the complainant herein against Benjamin W. Gillett, Morrillo H. Gillett, and David Sherman, impleaded with the Cunard Steamship Company, as defendants, in which interlocutory decree it was ordered, adjudged, and decreed that the aforesaid letters patent are good and valid in law.

And your orator further shows that in pursuance of the last-named decree an injunction was issued in the case perpetually enjoining the defendants therein and their attorneys, clerks, agents, and workmen from directly or indirectly infringing the said letters patent.

And your orator further shows that but for the infringement herein complained of, and others of like character, your orator would still be in the undisturbed possession, use, and enjoyment of the exclusive privilege secured by the said letters patent and in receipt *and* profits of the same.

5 And your orator further shows unto your honors, as it is informed and believes, that since the 22nd day of November, 1877, the defendant herein named, well knowing all the facts hereinbefore set forth, and against the will of your orator and in violation of your orator's rights under the said letters patent, has been and is now infringing the said letters patent within the district of Massachusetts and elsewhere within the United States, by making, using, and vending the process of preserving meats described and claimed in the aforesaid letters patent, and is now and for time prior to the date of this bill has been engaged in the business of shipping fresh meat from the port of Boston to ports in Great Britain by means of the process described and claimed in the aforesaid letters patent; all which acts and doings are contrary to equity and good conscience and tend to the manifest injury of your orator in the premises.

Amendment of Bill of Complaint. (*Filed March* 14, 1887; *Allowed March* 26, 1887.)

Your orator is informed and believes, and therefore avers the fact to be, that as early as the year 1881, if not earlier, all the shippers of fresh meats in refrigerators from the United States to Europe (all of whom were infringing the letters patent in suit), including Joseph Eastman, a citizen of the city and State of New York; Swift Brothers and Company, Francis Jewett and Company, and G. W. and N. E. Hollis, firms doing business in the city of Boston, State of Massachusetts; Martin, Fuller and Company, a firm doing

6 business in the city of Philadelphia, State of Pennsylvania; Daniel Toffey and Company, a firm doing business at Jersey City, in the State of New Jersey, and the defendants, B. W. Gillett *et al.*, in the aforesaid suit in the United States circuit court for the district of New Jersey, entered into a corrupt and unlawful combination for the purpose of contesting all claims and suits under the letters patent of the United States No. 197,314, here in controversy, and conspired to deprive your orator of its rights under the said letters patent.

That under the agreement entered into by the members forming such combination each member of the combination was to contribute and pay, according to the amount of business done by him, a certain share of the expenses attending the defence of any suit for the infringement of the aforesaid letters patent brought against any member of the combination; that such combination as early as the year 1881, if not earlier, undertook the defence of the aforesaid suit against B. W. Gillett *et al.*, paying all the expenses connected with the defence of that suit and employing counsel who appeared for the defendants therein; that such combination ever since its formation has paid and is now paying all the expenses attending the de-

fence of the aforesaid suit against B. W. Gillett *et als.* or in any way connected therewith; that early in the year 1883, if not sooner, the defendant in this suit, with full knowledge of the rights of your orator under the letters patent in controversy and in violation of the same, and with full knowledge of all the proceedings in the aforesaid suit against B. W. Gillett *et als.* and of the interlocutory decree entered therein sustaining the said letters
7 patent, became a member of such combination and had the benefit of all proceedings previously taken by or in behalf of such combination, and that ever since it became a member of such combination the defendant herein has paid and is still paying its proper share of the expenses attending the defence of the aforesaid suit against B. W. Gillett *et als.*, which is still pending in the United States circuit court for the district of New Jersey, thereby becoming a privy to such case and bound by the interlocutory decree and other determinations therein.

Your orator further shows that it is pretended by the defendant herein that the letters patent in suit have expired because of the expiration of a prior Canadian patent issued to the same inventor for the same invention.

Your orator admits that letters patent of the Dominion of Canada, No. 6933, bearing date January 9, 1877, and purporting to have been issued on January 11, 1877, were granted to John J. Bate for certain inventions or improvements in refrigerators, &c., the same including as one feature the invention secured by letters patent of the United States No. 197,314, here in suit, and that the said letters patent of the Dominion of Canada purport on their face to have been issued for a term of five years from and after January 9, 1877.

Your orator, however, avers that application was made for the aforesaid letters patent of the United States No. 197,314 on the first day of December, 1876, while the application for the aforesaid letters patent of the Dominion of Canada was not made until the 19th day of December, 1876, as your orator is ready to prove.

8 Your orator is further informed and believes, and therefore avers the fact to be, that the aforesaid letters patent of the Dominion of Canada were not actually or legally issued nor the inventions or improvements thereby secured patented until on or about the 26th day of June, 1878, on or about which date a model of the invention, as required by law and from the filing of which no dispensation had been granted, was filed in the Patent Office of the Dominion of Canada, and that the aforesaid letters patent of the Dominion of Canada did not actually or legally issue nor were the inventions or improvements thereby secured patented until after the filing of such model, and that the said Canadian letters patent were not delivered to the applicant or his legal representatives until after the filing of such model.

Your orator is further informed and believes, and therefore avers the fact to be, that on or about the 9th day of July, 1883, judgment was rendered by the superior court of the Province of Quebec, district of Montreal, Canada, in a suit brought by the Honorable Sir Alexander Campbell, in his quality of attorney general for the

Dominion of Canada, against John Jones Bate, trustee, declaring the aforesaid letters patent of the Dominion of Canada null and void *ab initio*, as by a duly authenticated copy of which judgment, ready in court to be produced, will more fully appear; that thereafter the aforesaid combination, including the defendant in this present case, and proceeding in the name of B. W. Gillett *et als.*, the defendants in the aforesaid suit pending in the United States circuit court for the district of New Jersey, were permitted
9 to intervene in the aforesaid suit in Canada and contest the judgment which had been rendered by the court voiding the Canadian patent.

That thereafter, on or about the 30th day of June, 1886, judgment was rendered by the aforesaid court in Canada vacating and setting aside its previous judgment voiding the Canadian patent and declaring that the aforesaid letters patent of the Dominion of Canada were not null and void *ab initio*, but were, as a matter of fact, good and valid in law and then existing by virtue of the payment of the fees required by law and an act passed by the Parliament of the Dominion of Canada, assented to May 25th, 1883—46 Victoria, chap. 19; and, further, that the aforesaid letters patent of the Dominion of Canada had not been issued on the 11th day of January, 1877, as set forth on their face, but were issued subsequent to the filing of the model, on or about the 26th day of June, 1878; all of which will more fully appear by a duly authenticated copy of the said judgment and of the pleadings and other papers in the case, ready in court to be produced.

Your orator is further informed and believes, and therefore avers the fact to be, that according to an act of the Parliament of the Dominion of Canada, assented to May 25th, 1883—46 Victoria, chapter 19—the original term of the aforesaid letters patent of the Dominion of Canada was actually fifteen years instead of five years, and that by virtue of the due and proper payment of the fees required by law the term of the aforesaid letters patent of the Dominion of Canada has not ceased or terminated and will not
10 cease or terminate before the 9th day of January, 1892, as by a duly authenticated copy of said act of Parliament and of the said Canadian letters patent, together with the annexed certificates of the payment of the fees required by law, ready in court to be produced, will more fully appear.

Forasmuch as your orator can have no adequate relief except in this court, and to the end, therefore, that the defendant may, if it can, show why your orator should not have the relief hereby prayed, and may make a full disclosure and discovery of all the matters aforesaid, and upon its corporal oath and according to the best and utmost of its knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to the matters hereinbefore stated and charged—

And that the defendant may be decreed to account for and pay over the income or profits thus unlawfully derived from the violation of your orator's rights, and be restrained from any further violation of said rights, your orator prays that your honors may

grant a writ of injunction, issuing out of and under the seal of this honorable court, perpetually enjoining and restraining the said defendant, its clerks, attorneys, agents, servants, and workmen, from any further construction, sale, or use in any manner of said patented improvement or any part thereof in violation of your orator's rights as aforesaid, and that the material now in possession or use of the said defendant may be destroyed or delivered up to your
11 orator for that purpose.

And that your honors, upon the rendering of the decree above prayed, may assess or cause to be assessed, in addition to the profits to be accounted for by the defendant as aforesaid, the damages your orator has sustained by reason of such infringement, and that your honors may increase the actual damages so assessed to a sum equal to three times the amount of such assessment under the circumstances of the wilful and unjust infringement by said defendant, as herein set forth.

And your orator further prays that a provisional or preliminary injunction be issued restraining the said defendant from any further infringement of said letters patent pending this cause, and for such other and further relief as the equity of the case may require and to your honors may seem meet.

May it please your honors to grant unto your orator not only a writ of injunction, conformable to the prayer of this bill, but also a writ of subpœna of the United States of America, directed to the said George H. Hammond and Company, commanding it on a day certain to appear and answer unto this bill of complaint, and to abide and perform such order and decree in the premises as to the court shall seem proper and required by the principles of equity and good conscience.

E. M. JOHNSON,
Solicitor for Complainant and of Counsel.

BENJ. F. BUTLER, *Of Counsel.*

12 UNITED STATES OF AMERICA, *Southern District of New York,* } ss:

On this 11th day of December, 1886, before me personally appeared John J. Bate, president of the corporation complainant above named, who, being by me duly sworn, deposes and says that he is the president of the Bate Refrigerating Company, the corporation complainant, and that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

JOHN J. BATE.

Sworn to before me this 11th day of December, 1886.
[SEAL.] GEO. W. MIATT,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

Copy.

On the twenty-second day of January, A. D. 1887, the following plea was filed:

Defendant's Plea. (*Filed Jan.* 22, 1887.)

The plea of George H. Hammond and Company, defendant, to the bill of complaint of the Bate Refrigerating Company, complainant, against this defendant.

This defendant, not confessing any of the allegations in said bill of complaint to be true as the same are herein set forth, for plea to the whole of said bill says—

13 1. That on the ninth day of January, A. D. 1877, letters patent of the Dominion of Canada for the same invention as that set forth, described, and claimed in the letters patent No. 179,314, in said bill of complaint mentioned, numbered 6938, were granted to the same John J. Bate mentioned in said bill of complaint for the term of five years from and after said ninth day of January, A. D. 1877.

2. That prior to the grant of the patent No. 197,314, in said bill of complaint mentioned, the same invention had been patented in Canada by the said John J. Bate by letters patent of the Dominion of Canada numbered 6938, bearing date the ninth day of January, A. D. 1877, and granted for the term of five years from and after that date.

3. That after the expiration of said patent No. 197,314, at the end of the term of five years for which said Canadian patent was granted, the circuit court of the United States for the district of New Jersey, upon being advised of the grant of said Canadian patent, vacated and set aside an injunction which it had theretofore granted against B. W. Gillett *et al.*, which is the injunction mentioned in said bill of complaint.

4. That subsequently and on or about the ninth day of July, A. D. 1883, the said John J. Bate and the said Bate Refrigerating Company procured the rendition of a judgment by the superior court for Lower Canada declaring said Canadian patent number 6938 void *ab initio* and vacating and setting the same aside.

5. That said judgment of said superior court for Lower Canada being subsequently brought to the attention of the circuit court of the United States for the district of New Jersey, said court,

14 on or about the twenty-fifth day of March, A. D. 1884, reinstated the injunction against said B. W. Gillett *et al.* heretofore mentioned.

6. That subsequently and on or about the thirtieth day of June, A. D. 1886, the said superior court for Lower Canada, in a suit wherein the Honorable Sir Alexander Campbell, minister of justice and attorney general of the Dominion of Canada, said John J. Bate, and said B. W. Gillett *et al.* were parties, found and adjudged that its former judgment of July ninth, A. D. 1883, was procured by the fraud to the law and collusion of said John J. Bate and said

Bate Refrigerating Company deceiving the attorney general, the advocates, and the court, and absolutely set aside and vacated said judgment.

Wherefore this defendant says that it is advised that said patent number 197,314, in said bill of complaint mentioned, expired on the ninth day of January, A. D. 1882, and that this court sitting as a court of equity has no jurisdiction to hear and determine an action in equity for the infringement of said patent, and prays the judgment of this honorable court whether it shall be compelled to make any other or further answer to said bill of complaint, and prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

GEO. H. HAMMOND & CO.,
By JAMES D. STANDISH, *Sec'y.*

WM. B. H. DOWSE,
S. N. ALDRICH,
Solicitors for Defendant.
GEO. H. LOTHROP, *Of Counsel.*

15 On the fifth day of April, A. D. 1887, the following answer was filed:

Answer. (*Filed April* 5, 1887.)

The answer of George H. Hammond and Company, a corporation, defendant, to the amended bill of complaint of the Bate Refrigerating Company, complainant, against this defendant.

This defendant, saving and reserving to itself all manner of benefit and advantage of exception to the manifold errors and insufficiencies of said amended bill of complaint, for answer thereunto or unto so much thereof as it is advised is necessary and material for it to make answer unto, answering, says:

As to that part of said bill of complaint which refers to the alleged invention of said John J. Bate, to the issue of letters patent of the United States No. 197,314, to the adjudication as to the validity of said patent, and as to the infringement thereof by this defendant, this defendant says:

1. This defendant admits that it is a corporation duly organized under the laws of the State of Michigan, and that it has an office and does business in the city of Boston, in the State of Massachusetts.

2. This defendant is informed and believes that the complainant, The Bate Refrigerating Company, although it purports to be a corporation duly incorporated under the laws of the State of New York, is not really and legally a corporation, because the parties who have associated themselves together under the name of complainant have not associated together for any purpose or
16 business for which under the laws of the State of New York a corporation may be legally formed.

2. This defendant, further answering, says that it is informed and

believes that a paper writing purporting to be letters patent of the United States No. 197,314, dated November 20, 1877, was issued to John J. Bate, as set forth in said bill of complaint.

4. This defendant, further answering, says that it is not informed, save by said bill of complaint, whether the said John J. Bate assigned said letters patent No. 197,314 to the complainant, and can neither admit nor deny the same, and leaves complainant to its proof thereof.

5. This defendant, further answering on information and belief, denies that the said John J. Bate was the original and first inventor of the alleged invention pretended to be secured to him by said letters patent No. 197,314 or of any material or substantial part thereof and avers that prior to the alleged invention of said John J. Bate the same or substantially the same process described and claimed in said letters patent was openly and publicly used in the United States by and known to the following-named persons at the following-named places, to wit:

At the city of Boston, in the State of Massachusetts, by Lowell B. Hiscock, William B. Winslow, Charles H. Hiscock, Arthur Harrington, Samuel Ritchie, Nathan C. Mulliken, J. Frederick J. Johnson, Marlborough Williams, George F. Williams, Lorenzo M. Dyer, Henry W. B. Frost, Samuel B. Krogman, Elisha S. Stacey, Samuel S. Learnard, Cyrus S. Hapgood, Charles Dana, Amos T.
17 Davis, Francis W. Dudley, Albert D. Rogers, Nathaniel B. Plumer, all of whom reside in the city of Boston; Sullivan Sawin, who resides in Pembroke, Massachusetts, and J. Gross, who resides in Somerville, Massachusetts.

At Framingham, Massachusetts, by Sylvanus Phipps, now deceased, and known by M. M. Marshall, who resides at the city of Boston.

At Fall River, Massachusetts, by and known to David M. Anthony, Charles W. Anthony, George W. Grinnell, and Addison C. Albert, all of whom reside at said Fall River.

At Westport, Massachusetts, by D. H. Cornell & Company, and known to William C. Cornell and Daniel H. Cornell, who reside at said Westport.

6. This defendant, on information and belief, avers that the suit against Snowden and McConville, in said bill of complaint mentioned, was begun on or about November 26, 1877, and that on or about December 1st, 1887, a decree was entered therein by consent, and that no adjudication upon the validity of said letters patent 197,314 was ever had in said case.

7. This defendant, further answering on information and belief, admits that a suit was brought by said complainant on said letters patent in the circuit court for the district of New Jersey, in equity, against Benjamin W. Gillett, Morille H. Gillett, and David H. Sherman, impleaded with the Cunard Steamship Company, and that on or about the 13th day of September, 1881, his honor Judge Nixon rendered a decree in said case sustaining the validity of said letters patent, finding that the defendant in said cause had infringed the

same, and ordering a perpetual injunction and an accounting
18 against said defendants.

And these defendants, on like information and belief, aver that in said cause against said Benjamin W. Gillett *et al.* none of the defences against the validity of said patent made in this answer were either set up in the answer in said cause or put in proof, and that none of the witnesses named by this defendant as having used said invention prior to the alleged invention thereof by said Bate were examined in said cause, as by a copy of the record in said cause, when produced and proven as this honorable court shall direct, and to which this defendant prays leave to refer, will more fully and at large appear.

8. This defendant, further answering, says that its business is killing cattle and shipping dressed beef in refrigerator cars from Hammond, Indiana, to Eastern points.

That defendant was incorporated to assume and carry on the business of shipping dressed meats, which was, up to the time of defendant's incorporation, carried on by a copartnership, under the name of George H. Hammond & Company, at the head of which was the late George H. Hammond, who died December 29, 1886, who was also, up to the time of his death, president of this defendant.

That the said George H. Hammond, up to some time in the year 1880 or 1881, was also engaged to some extent in the business of shipping dressed meats in refrigerators to England, and that he discontinued this branch of his business some time in the years 1880 or 1881.

That in the month of April, 1883, this defendant began the
19 shipment of dressed meats in refrigerators to England and has ever since carried on the same; that the great bulk of the business of defendant, amounting to about 90 — of its whole business in dressed meats, consists in the shipment of dressed meats from said Hammond to cities and towns in the Eastern and New England States, and that the beef shipped for such markets is always uncovered—without any cloth around the same—because when a refrigerator car of defendant containing dressed meats arrives at its point of destination, as for instance the city of Boston, the car is usually run close to a stationary refrigerator and the meat is transferred from the car to that refrigerator, and from there is distributed directly to the retail butcher or consumer, with little handling and little exposure to the outer air, and in this business a covering for the meat is entirely unnecessary, is of no value, and is never used by this defendant.

That in the shipment of dressed meat by this defendant to England the meat is covered with cloth at Hammond and is in that condition placed in refrigerator cars and shipped to the seaboard.

The meat is then taken from the cars, carried on board a steamship, and there placed in a refrigerator.

On the arrival of the steamship in Liverpool the meat is taken out of the refrigerator, loaded on lighters, transferred to the wharf, then transferred to cars, and finally at London transferred from the

cars to the shop of the wholesale agent, from whence it is distributed to butchers and consumers.

That with these repeated handlings it is necessary, in order
20 to keep the meat clean so that it will be salable at its point of destination, to protect the same by some covering, and for this reason defendant covers it with cloth.

That when the meat is transferred from a refrigerator car to the steamer, and again from the refrigerator on the steamer to the cars in England, it is usually colder than the open air, so that when exposed to the open air in the process of transfer the moisture of the air is deposited on the meat, and that when covered this moisture is deposited upon the covering and the meat is thus protected; that it is commercially impracticable for this defendant to keep at each point of transfer empty bags to envelop the meat in during the time of transfer, because the largely increased cost of labor necessary to do this would be more of a tax than the business can stand, and because it is not advisable to use a covering more than once, because the dirt, dust, and moisture which it absorbs would be injurious to the meat, and that therefore it is cheaper and better to use a fresh covering of cheap cloth on each quarter and throw the same away when the meat has reached its destination.

9. This defendant, further answering, avers that the use of a covering upon dressed meats which it ships abroad is necessary to the proper conduct of this business, and that an injunction restraining this defendant from so using said covering would seriously interfere with defendant's export business and subject it to irreparable injury.

That the alleged invention described and claimed in said patent is one which can be used only by persons engaged in the shipment of dressed meats and has no value whatever outside of said
21 business; that it is informed and believes that the complainant is not now and never has been engaged in the business of shipping and selling dressed meats or in any business in which it could make use of said invention, but that said complainant seeks to utilize said patent and to make gains and profits therefrom solely by means of either selling the patent or of licensing others to use said patent, and that said complainant has several times offered to license this defendant to use said patent.

And this defendant says that it has property consisting of slaughter-houses, real estate, refrigerators, cars, cattle, and meat of the value of more than two million ($2,000,000) dollars, subject to execution, and is abundantly able to pay any decree that may be rendered against it in this cause; wherefore this defendant submits to the court that the grant of a preliminary injunction against it in this cause is not necessary to prevent irreparable injury to the complainant, but would, on the contrary, work irreparable injury to this defendant and would force this defendant to pay to said complainant a large amount of license fees pending the decision of this suit, which this defendant could not, in the event of a favorable decision to it, recover from said complainant, because it is informed and believes that said complainant is utterly irresponsible and has

no property save the patent here in suit and one or two other patents which this defendant deems of no value.

And as to the allegations in said amended bill of complaint charging the defendant and others with conspiracy and unlawful combination to contest suits brought under said patent
22 197,314 and with being privy to the said cause brought by complainant against the said Gillett *et al.* and estopped and bound by the decree therein, this defendant. answering, says:

10. This defendant is informed and believes that subsequent to the decision by his honor Judge Nixon in said Gillett case sustaining the validity of said letters patent certain parties then engaged in the business of shipping dressed meats from this country to England, being informed by their counsel that the defendants in said Gillett case had not in their defence put before the court the true state of the art, formed a combination for the purpose of jointly sharing the expense of contesting a test case under said patent, but that this defendant was not at this time engaged in the business of exporting dressed meats and was not a party to said combination.

11. That when this defendant subsequently began the shipment of dressed meats to Europe Mr. Joseph Eastman and Mr. G. F. Swift, who represent said combination in defending said patent, represented to this defendant that it ought to bear a portion of the expense of said combination, and that thereupon, in the year 1885, this defendant assented to said representations and paid its proportion of all expenses incurred by said combination in contesting said patent subsequent to October 1st, 1882; that this matter was entirely in the charge of the late Mr. George H. Hammond; that none of the officers of this defendant now living knew, except in a general way, what suits or proceedings were embraced in the expenses of said combination to which this defendant contributed, but
23 that it can and will show the same fully through Mr. Joseph Eastman, who had personal charge of the affairs of said combination.

And this defendant denies that it ever had anything to do, directly or indirectly, with the conduct of the defence in the said Gillett case prior to the entry of the interlocutory decree therein; denies that it ever had any control whatever of the proceedings in said case prior to said decree; denies that it ever contributed a dollar to the defence made in the case against the validity of said patent, and submits to the court that it is in nowise bound or estopped by interlocutory decree rendered therein.

12. And this defendant, further answering, denies that said combination, so far as this defendant has been connected therewith, is corrupt and unlawful or was made for any purpose except that of lightening the expense of preparing for a full and fair hearing as to the merits of said patent upon a proper defence, and says that it has been informed by the committee having charge of the affairs of said combination and by counsel connected with the litigation under this patent that all efforts on the part of said combination to obtain a fair hearing on the merits has been thwarted by the action of said complainant, who has up to this time invariably dismissed

every suit in which such hearing could have been had as soon as it appeared that the evidence of the prior use hereinbefore referred to was taken in such suit, whereby said combination has been unable to bring any suit under this patent to final hearing.

And as to all allegations in said amended bill of complaint contained relating to the issue of letters patent for the Dominion
24 of Canada to said John J. Bate for the invention described and claimed in said patent 197,314 prior to the date thereof this defendant, answering, says:

13. This defendant, on information and belief, avers that prior to the grant of said letters patent 197,314 the same invention had been patented in Canada by the said John J. Bate by letters patent of the Dominion of Canada No. 6938, bearing date the 9th day of January, 1877, and registered on the 11th day of January, 1877, and granted for the term of five years from and after said 9th day of January, 1877.

That in granting said patent 197,314 the Commissioner of Patents neglected to limit the term of said patent to five years from the 9th day of January, 1877, but assumed to issue No. 107,314 for the period of seventeen years — and after its date, whereby said patent was issued in violation of the statute in such case made and provided and without any right or authority on the part of the Commissioner of Patents so to do, and this defendant submits that said patent is therefore null and void.

14. This defendant, further answering, says that it admits the grant to said John J. Bate of letters patent of the Dominion of Canada No. 6938, bearing date the 9th day of January, 1877, for a term of five years from and after said date, for the invention subsequently patented in the United States to the said Bate by said patent No. 197,314.

15. This defendant, on information and belief, admits that the application upon which said letters patent of the Dominion of
25 Canada were granted was not filed in the Canadian Patent Office until subsequent to the filing in the United States Patent Office of the application upon which said patent No. 197,314 was granted, and on like information and belief admits that said Bate did not file a model of his alleged invention in the Patent Office of Canada until after the grant of his Canada patent.

16. And this defendant, on information and belief, avers that at the time of the application for the grant of said Canadian patent it was the custom and practice of the commissioner of patents for Canada to receive applications for letters patent without a model; to examine said applications and grant patents thereon if the inventions were found patentable, and thereupon to notify the applicant that a patent had been granted for his invention, "and that the same will be forwarded on receipt of a model of the invention," whereby the patent was granted and took effect upon the date of its grant, but was not actually delivered to the patentee until after the filing of the model, and therefore this defendant, on information and belief, avers that the invention described and claimed in said Canada patent 6938 was actually patented to said John J. Bate on the 9th

day of January, 1877, and denies that it was patented to said John J. Bate on or about the 26th day of June, 1878, as averred in said amended bill.

17. This defendant admits that on or about the 9th day of July, 1883, the superior court for Lower Canada rendered a judgment declaring said Canadian patent No. 6938 null and void *ab initio*, and that thereafter and on or about the 30th day of June, 1886,
26 the said court rendered a judgment in a suit where said John J. Bate, as trustee for the Bate Refrigerator Company, was a party, vacating and setting aside its former judgment; and this defendant, on information and belief, avers that the said last-named judgment of said superior court for Lower Canada was rendered upon the express ground that its former judgment was obtained by the fraud of said Bate, and that said court held that said patent No. 6938 was legally issued on the 9th day of January, 1877, as by a copy of the said judgment, when produced and proved as this honorable court shall direct, will more fully and at large appear.

18. And this defendant, further answering on information and belief, avers that on the 30th day of November, 1881, the said John J. Bate executed a petition to the commissioner of patents for Canada for the extension of said patent No. 6938, in which the said Bate averred "that on the 9th day of January, 1877, your petitioner obtained a patent for the period of five years from the said date for new and useful improvements on apparatus and process for ventilation, refrigerators, &c.; that he is the holder of said patent in trust for the Bate Refrigerator Company, and therefore prays that it may be extended for another period of ten years," and that upon the filing of this petition in the Patent Office of Canada an extension of patent No. 6938 for the period of five years from the 9th day of January, 1882, No. 13812, was granted December 12, 1881, and a further extension of said patent for the term of five years from and after January 9th, 1887, No. 13813, was granted December 13th, 1881, whereby this defendant submits that the said complain-
27 ant is estopped from denying the fact that said patent No. 6938 was legally granted January 9th, 1877, for a period of five years.

19. This defendant, further answering on information and belief, denies that by virtue of the act of Parliament of the Dominion of Canada assented to May 5th, 1883 (46 Vict., c. 19), the original term for which said Canada patent No. 6938 was granted was fifteen years instead of five years, and denies that said act can have any effect whatever upon the duration of said patent No. 197,314.

20. And this defendant submits to the court that by reason of the prior patenting of said invention by said Bate in Canada for a period of five years from and after the ninth day of January, A. D. 1877, said patent No. 197,314, if valid at all, expired on the 9th day of January, 1882, and that therefore this court, sitting in equity, has no jurisdiction to hear and determine an action for the infringement of said patent, and prays the same benefit of this defence as if the same had been formally pleaded to said amended bill.

Wherefore this defendant prays to be hence dismissed with costs.

GEO. H. HAMMOND & CO.,
By JAS. D. STANDISH, *Sec'ry.*

WM. B. H. DOWSE,
Solicitor for Defendant.
GEO. H. LOTHROP,
B. F. THURSTON,
Of Counsel.

STATE OF MICHIGAN, } ss:
County of Wayne, }

James D. Standish, of Detroit, in said county and State, being duly sworn, deposes and says that he is secretary of the defendant corporation, George H. Hammond and Company, and signed the foregoing answer in behalf of said defendant; that he has
28 read said answer and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated on information and belief of the defendant, and as to such matters *as* he believes it to be true.

JAMES D. STANDISH.

Sworn to and subscribed before me this 28th day of March, A. D. 1887.

[SEAL.] BETHUNE DUFFIELD,
Notary Public, Wayne Co., Michigan.

On the thirtieth day of April, A. D. 1887, the following stipulation was filed:

Stipulation. (*Filed April* 30, 1887.)

Whereas the answer of the defendant corporation in this cause set up, in addition to other defences, that the patent on which this suit is brought, being number 197,314, granted to John J. Bate, complainant's assignor and president, on the twentieth day of November, A. D. 1877, expired on the ninth day of January, A. D. 1882, by reason of the prior grant to said John J. Bate of a patent in the Dominion of Canada for the same invention, and prays the same benefit of said defence as if the same had been pleaded to the bill of complaint; and

Whereas both parties desire to have said matter of defence argued and decided without incurring the great expense of taking
29 testimony necessary to present for final hearing all the defences raised in said answer:

It is therefore stipulated and agreed by and between the parties that the defence above named shall be submitted to the court, as on plea set down for argument, upon the following agreed state of facts:

1. The patent in suit, No. 197,314, was granted to John J. Bate on November 20, 1877, and the application therefor was filed in the

United States Patent Office December 1, 1876; said patent was assigned to complainant before this suit was brought, the said Bate being a citizen of the United States at the time of said application and the said invention having been made and reduced to practice by him therein.

2. On December 19, 1876, said John J. Bate filed in the Patent Office of the Dominion of Canada an application for a patent for improvements in apparatus and processes for ventilation, refrigeration, etc., including therein as one feature the process described and claimed in said patent 197,314.

3. In pursuance of said application the commissioner of patents for the Dominion of Canada caused letters patent of the Dominion of Canada, No. 6938, for the invention set forth in said application, and granting to said John J. Bate, his executors, administrators, and assigns, the exclusive right, privilege, and liberty of making, constructing, using, and vending to others to be used, the said invention, to be signed and sealed with the seal of the patent office on January 9, 1877, and to be registered on January 11, 1877, and that the period of said grant expressed in said patent was five
30 years from and after January 9, 1877.

4. On January 12, 1877, said commissioner of patents called upon said John J. Bates to furnish to the patent office a model of his said invention, and such model was furnished by said Bate on June 26, 1878, on which day said patent No. 6938 was mailed to said John J. Bate.

5. On December 5, 1881, said John J. Bate filed a petition in the Canada Patent Office, a certified copy of which is filed in this cause and may be read as a part of this statement of facts.

6. On December 12, 1881, said patent No. 6938 was extended for five years from January 9, 1882, under renewal No. 13812, and on December 13, 1881, said patent was further extended for five years from January 9, 1887, under renewal No. 13813, in pursuance of the above-named petition.

7. On about July 9, 1883, and June 30, 1886, the superior court for Lower Canada rendered two judgments affecting said Canada patent, certified copies of which are filed in this cause and are to be read as part of this statement of facts.

8. The patent laws of Canada from 1872 to date are as follows:
The patent act of 1872, June 14, 1872, 35 Vict., c. 26.
Act of May 23, 1873, 36 Vict., c. 44.
Act of May 26, 1874, 37 Vict., c. 44.
Act of Apr. 8, 1875, 38 Vict., c. 14.
Act of May 17, 1882, 45 Vict., c. 22.
Act of May 25, 1883, 46 Vict., c. 19.
Act of May 19, 1884, 47 Vict., c. 38.
Copies of which are filed in this cause, and may be read as
31 part of this statement of facts.

9. That complainant and defendant are both corporations.

10. That on the argument of this cause either party may read any copy, paper, or affidavit filed in this cause relating to said Canada patent or patent laws, including the British North American

act, 1867, to explain this statement of facts, and may cite any English and Canadian authority or precedent bearing on the question involved in this cause as if expressly mentioned herein.

It is further stipulated and agreed that the motion for preliminary injunction heretofore made in this cause shall stand postponed until the decision of this cause by this court under this stipulation, and that if the decision of the court shall be in favor of the complainant said motion may be brought on for hearing upon the papers already filed, and the complainant may file affidavits concerning prior use, and either party may file such others as either party may obtain leave to file on giving due notice of said motion under the rules.

It is further stipulated and agreed that if the decision of this court be in favor of the complainant said complainant shall have a reasonable time thereafter to file a replication to the answer of defendant, and that said cause shall thereafter proceed in the ordinary manner.

It is further stipulated and agreed that if this court shall decide this cause in favor of the defendant a decree shall be entered dismissing the bill of complaint herein, so that the complainant may take an appeal from said decree to the Supreme Court of the United States, and that if said Supreme Court shall refuse to entertain and decide said appeal because informally presented, the defendant will consent to an order by this court vacating its decree and reinstating said bill.

32

It is further stipulated and agreed that if this court shall decide this cause in favor of defendant, and the supreme court shall, on appeal, reverse said decision, the defendant shall have a right to proceed in this court under its answer as to all defences set up therein, except the one herein mentioned, as it might have proceeded if this stipulation had not been made.

Dated Boston, April 29, 1887.

E. M. JOHNSON,
Solicitor for Complainant.
WM. B. H. DOWSE,
Solicitor for Defendant.

This cause came on to be heard by the court upon the pleadings and stipulation aforesaid, and was continued under advisement to this present term, when the following rescript is filed:

Rescript. (*Sept.* 24, 1887.)

COLT, *J.*:

The questions raised under the stipulation in this case having recently been decided by Mr. Justice Bradley in favor of the defendants in a suit by this complainant *v.* Gillett and others, in the circuit court for the district of New Jersey, and both parties desiring to appeal the case to the next term of the Supreme Court, a decree may be entered sustaining defendant's plea and dismissing the bill.

33 Thereupon the following final decree is entered.

Final Decree. (*Sept.* 24, 1887.)

This cause came on to be heard at the October term of this court, A. D. 1886, upon the pleadings and the stipulation of the parties, with the papers submitted under the said stipulation. This cause was thence continued under advisement to this present term; and now, to wit, September 24, 1887, it is ordered, adjudged, and decreed that the bill of complaint in this cause be, and the same is hereby, dismissed with costs for the defendant, taxed at ——.

From this decree the complainant in open court claims an appeal to the Supreme Court of the United States and gives good and sufficient security that it will prosecute its appeal to effect and answer all costs if it fails to make its plea good, and said appeal is allowed.

A true record.

Attest: JOHN G. STETSON, *Clerk.*

34 The following papers were submitted to the court under the stipulation herein:

1. Bate American patent.
2. Bate Canadian patent.
3. Petition, &c., to extend Bate Canadian patent.
4. Canadian judgment of July 9, 1883.
5. " " " June 30, 1886.
6. Certificate of date of application for Canadian patent.
7. " " call for model and date of filing model.
8. " as to furnishing model.
9. Affidavit of John J. Bate.
10. Patent laws of Canada:

Patent act of 1872, 35 Victoria, chap. 26.
Act of May 23, 1873, 36 " " 44.
Act of May 26, 1874, 37 " " 44.
Act of Apr. 8, 1875, 38 " " 14.
Act of May 17, 1882, 45 " " 22.
Act of May 25, 1883, 46 " " 19.
Act of Apr. 19, 1884, 47 " " 38.

11. British North American act, 1867.
12. Affidavits of John S. Archibald and G. N. Robertson.
13. Decision "St. Andrew's church."
14. Interference decision, Bate patent.
15. Petition to dissolve injunction in Bate Refrigerating Company *v.* Gillette *et al.*

35 1.

BATE AMERICAN PATENT.

UNITED STATES PATENT OFFICE.

JOHN J. BATE, of Brooklyn, New York.

Improvement in Processes for Preserving Meats During Transportation and Storage.

Specification forming part of Letters Patent No. 197,314, dated November 20, 1877; application filed December 1, 1876.

To all whom it may concern:

Be it known that I, John J. Bate, in the city of Brooklyn, in the county of Kings and State of New York, have invented certain improvements in processes for preserving meats during transportation and storage, of which the following is a specification.

This invention relates to the transportation and storage of meats in large pieces—as, for example, in quarters—either by railway or steamer; and its object is to prevent the discoloration of the surface of the meat and the taint to the external portions of the meat, which, by methods hitherto adopted for preserving the same during transportation, frequently occur.

My said invention is based upon the discovery that fibrous or woven material has the power of absorbing from the atmospheric air the germs which provoke incipient decay on the surface of the meat, as aforesaid; and my said invention consists in the process of preserving meat during transportation and storage by enveloping the same in a fibrous or woven material—such, for instance, as the fabric commonly termed "burlaps"—and when thus enveloped subject the same to a current of air chilled or brought either by natural or artificial agencies to a suitably low temperature, maintaining the meat at the low temperature necessary to prevent decay, the envelope or burlaps or equivalent fibrous or woven material at the same time straining from the air the germs which provoke the incipient decomposition by which the surface discoloration and tainting ordinarily experienced are produced.

Referring to the accompanying drawings, forming part of this specification, figure 1 is a longitudinal sectional view, representing a refrigerating apparatus as employed in carrying my herein-described process into effect; and Fig. 2 is a side view, indicating a quarter of beef enveloped in fibrous or woven material, as in the practice of my said process.

In the practice of my said invention I provide any suitable chill-room or refrigerating-chamber, within or through which a current of air is produced. Such current may be either from the external atmosphere through said chill-room or refrigerating-chamber, and thence out again; or the said chamber or room may be closed against access of the external atmosphere, and its contained air be caused to

pass over and over again through a suitable ice-box or equivalent means of reducing the temperature thereof; and this causing of the air to pass repeatedly through the said ice-box or the like may be either by a change in the density of the air, as in the well-known Lyman refrigerator, or the said circulation of the air through the ice-box may be produced by means of a fan blower arranged in any suitable manner—as, for instance, in the drawing, Fig. 1.

Having thus provided the apparatus, the use of which is involved in one part or element of my invention, I take the meat—as, for example, quarters of beef—and wrap them around with burlaps or other like fibrous or woven material, preferably sewing the burlaps or tying the same to hold it in place. The meat being thus surrounded with the aforesaid material—in other words, having its surface covered thereby—I then place or hang the quarters of beef or the other pieces of meat, enveloped as just herein set forth, within the chill-room—as, for example, in Fig. 1, above referred to, in which the chill-room is represented at A, and the quarters of beef enveloped or covered, as described, by the reference-letter B. The air, being caused to circulate through the chill-room, as hereinbefore explained, passes through the interstices of the fibrous material in which the meat is wrapped, and thereby chills the same and keeps the entire mass at the low temperature requisite to its preservation; and the circulating air thus passing to and in contact with the meat has the germs of disease or decay effectually sifted or strained therefrom, the envelope not interfering with the access of air to the meat and the consequent requisite refrigeration thereof, but, as hereinbefore set forth, eliminating from the air as it comes in contact with the meat those causes of decomposition and decay which, without this covering to the meat, cause the surface of the meat to lose what is termed by butchers its "bloom"—in other words, the crisp and fresh appearance—upon which its highest market value depends.

The said covering also prevents that further decay which, in
36 ordinary practice, often destroys the taste and flavor, and even reaches a condition of incipient putrefaction in the surface portions of the meat.

I claim as my invention—

The herein-described process of preserving meat during transportation and storage by enveloping the same in a covering of fibrous or woven material, and subjecting it when thus enveloped to the continuous action of a current of air of suitably low and regulated temperature, substantially as and for the purpose set forth.

JOHN J. BATE.

Witnesses:
H. WELLS, JR.,
EDWARD HOLLY.

Corrections in Letters Patent No. 197,314.

Letters patent No. 197,314, granted November 20, 1877, upon the application of John J. Bate, of Brooklyn, New York, for an improvement in "processes for preserving meats during transportation

and storage," having issued without limitation, as required by section 4887 of the Revised Statutes, and affidavits having been filed in the Patent Office that said letters patent have been lost, and therefore cannot be returned for correction, in compliance with the request of the parties in interest, I hereby append a certificate to a certified copy of said letters patent limiting the term thereof so that it shall expire with a patent obtained by the patentee in Canada, No. 6938, dated January 9, 1877, for the same invention.

It is hereby certified that the proper entries and corrections have been made in the files and records of the Patent Office.

In testimony whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed this third day of July, A. D. 1883.

[SEAL.] E. M. MARBLE,
Commissioner of Patents.

Approved:
H. M. TELLER,
Secretary of the Interior.

(Here follows diagram marked p. 37.)

38 2.

Bate Canadian Patent.

Certified that the annexed is a true copy of a patent registered in the patent office under number (6938), granted to John Jones Bate and bearing date the ninth day of January, 1877, for "Bate's improved system of ventilation, refrigeration, &c.," with true copies of the specification and drawings remaining on record in this office, duplicate copies of which were attached to the patent above mentioned.

Department of agriculture, patent office, Ottawa, Canada, March 21st, 1887.

As witness the seal of the patent office, hereto affixed.

{ Seal Department of Agriculture, Canada, Inventions }
{ Patent Office, Bureau des Brevets D'Invention. }

H. CASGRAIN,
Act'g Deputy Commissioner of Patents.

39 *Specification.*

To all whom it may concern:

Be it known that I, John Jones Bate, of the city of Brooklyn, in the county of Kings, in the State of New York, one of the United States of North America, merchant, have invented new and useful improvements on apparatus and processes for ventilation, refrigeration, &c., in buildings, rooms, apartments, and the like; and I do hereby declare that the following is a full, clear, and exact description of the construction and operation of the same, reference being

had to the annexed drawings, wherein Fig. 1 is a longitudinal sectional view, representing a refrigerating apparatus as employed in the carrying into effect of one feature or part of my said
40 invention, and Fig. 2 is a side view, indicating a quarter of beef enveloped in fibrous or woven material as in the practice of said part of my said invention. Fig. 3 is a longitudinal sectional view of a refrigerator constructed according to another feature or part of my said invention. Fig. 4 represents a modification of said feature or part, and Fig. 5 illustrates still another modification of the same feature or part of my said invention. Figs. 6, 7, and 8 are vertical transverse sectional views, representing buildings, rooms, or apartments for various purposes, embracing another feature or part of my said invention, namely, that more particularly intended for ventilation, irrespective of the temperature of the atmosphere.

This invention is designed to secure the purification of air in buildings, rooms, apartments, and the like, either at ordinary temperatures as required in dwellings, hospitals, sea-going
41 vessels, railway cars, &c., or at the reduced temperature neccessary in refrigerators, commonly so termed, refrigerating cars, refrigerators on sea-going vessels, &c.

And the invention is based upon the discovery that fibrous material—for example, burlaps or other article of textile character made of jute, hemp, flax, cotton, or equivalent substance, as distinguished from charcoal or other inorganic air-filtering substance—possesses the property of absorbing from air passed therethrough the germs of disease, incipient putrefaction, and other noxious properties.

One portion of my invention relates to the preservation and storage of meats in large pieces—as, for example, in quarters—either by railway or steamer, and its object is to prevent the discoloration of the surface of the meat and the taint to the external portions of the meat which by the method hitherto adopted for preserving the same during transportation frequently occurs; and said por-
42 tion of my said invention is based upon my hereinbefore specified discovery that fibrous or woven material has the power of absorbing from the atmospheric air the germs which provoke incipient decay to the surface of the meat, as aforesaid; and my said invention consists in the process of preserving meat during transportation and storage by enveloping the same in a fibrous or woven material, such, for instance, as the fabric commonly termed burlaps, and when thus enveloped subjecting the same to a current of chilled or refrigerated air, the refrigerated air maintaining the meat at the low temperature necessary to prevent decay, and the envelope or burlaps or equivalent fibrous or woven material straining from the air the germs which provoke the incipient decomposition by which the surface discoloration and tainting ordinarily experienced is produced.

43 Another portion of my said invention relates to that class of apparatus designed for the preservation of meats, fruits, vegetables, &c., by retaining the same at a temperature below that at which decomposition ordinarily occurs; but, as hitherto constructed

and operated, such refrigerators, while in the main efficient, have been defective in this, that in the preservation of meats the outer surface of the meat has been liable to be brought to a condition more or less approaching incipient decay, thereby impairing the delicacy of its flavor and also destroying the crisp and fresh appearance of the surface, or, as it is termed by butchers, "the bloom," upon which in a great measure the highest market value of the meat depends.

My invention is designed to obviate this drawback to the most successful use of refrigerator for the preservation and storage
44 of meats. This said portion just last mentioned of my said invention consists in a refrigerator constructed with one or more germ-absorbers composed of burlaps or other suitable fibrous or woven material, through which the cooled air, circulated in contact with the surface of the meat, is caused to pass, the hurtful germs or external sources of decay being thus eliminated from the air before it comes in contact with the meats which it is designed to preserve. It is, as hereinbefore indicated, to be understood in this connection that the germ-absorbent of fibrous or woven material is used in contradistinction to masses of charcoal or like substance, through which the air has been hitherto passed in certain refrigerators, but in which such charcoal or like material has proved practically worthless in accomplishing the objects sought.

Still another portion of my said invention is designed more especially for the ventilation of buildings, rooms, and apart-
45 ments at ordinary temperatures—that is to say, without artificial refrigeration of the atmosphere in said building, room, or apartment, and without especial reference to the natural temperature of the air at any season of the year.

And to this end this last specified portion of my said invention comprises the combination, with a room, building, or apartment, of a fibrous absorbent of impurities and a fan blower or equivalent means of producing a forced circulation of air through or within the building, room, or apartment, as the case may be, whereby the air within said room or apartment is purified from the germs of disease and decay and of other noxious elements, and at a minimum expense rendered sweet and pure for respiration or other uses.

Having reference, first, to Figs. 1 and 2—

I provide any suitable chill-room or refrigerating chamber
46 within or through which a current of air is produced. Such current may be either from the external atmosphere through said chill-room or refrigerating chamber and thence out again, or the said chamber or room may be closed against access of the external atmosphere and its contained air be caused to pass over and over again through a suitable ice-box or equivalent means of reducing the temperature thereof, and this causing of the air to pass repeatedly through the said ice-box or the like may be either by a change in the density of the air, as in the well-known Lyman refrigerator, or the said circulation of the air through the ice-box may be produced by means of a fan blower, C, arranged in any suitable manner—as, for instance, in the drawing, Fig. 1. Having thus

provided the apparatus, the use of which is involved in
47 one part or element of my invention, I take the meat—as, for example, quarters of beef—and I wrap them around with burlaps or other like fibrous or woven material, preferably sewing the burlaps or tying the same to hold it in place. The meat being thus surrounded with the aforesaid material—in other words, having its surfaces covered thereby—I then place or hang the quarters of beef or other pieces of meat, enveloped as just herein set forth, within the chill-room—as, for example, in Fig. 1, above referred to, in which the chill-room is represented at A, and the quarters of beef enveloped or covered, as described, by the reference letter B. The air being caused to circulate through the chill-room, as hereinbefore explained, passes through the interstices of the fibrous material in which the meat is wrapped, and thereby chills the same and keeps the entire mass at the low temperature requisite to its preservation, and the circulating air thus passing to and in contact with
48 the meat has the germs of disease or decay effectually sifted or strained therefrom, the envelope not interfering with the access of air to the meat and the consequent requisite refrigeration thereof, but, as hereinbefore specified, eliminating from the air as it comes in contact with the meat those causes of decomposition and decay which, without this covering to the meat, cause the surfaces of the meat to lose what is termed by butchers its "bloom"—in other words, the crisp and fresh appearance—upon which its highest market value depends, the said covering also preventing that further decay which in ordinary practice often destroys the taste and flavor and even reaches a condition of incipient putrefaction in the surface portions of the meat.

Having reference now to Figs. 3, 4, and 5—

The construction of the refrigerator itself may be varied within wide limits, so long as its operation involves the circulation
49 through it or within it of air cooled to the temperature usually adapted for the preservation of meats, &c., and I do not limit myself in this respect to the employment of either or all of the forms represented in the drawings hereinbefore referred to. Said drawings illustrated those modifications of my invention which I consider the most useful, but not all those which may be adopted.

Having reference, first, to Fig. 3—

A is the chill-room, in which the meat is to be placed for preservation. B^x is a fan blower, opening to the external atmosphere, as at *a*, and connecting with the interior of the chill-room A, as shown at *b*. The floor of the chill-room A is perforated with any desired number of holes or openings C, said floor being raised above the subfloor C^x, so that the space or chamber *d* is left between the perforated floor and the said subfloor C^x. Around the sides of this chamber is secured one or more thicknesses of burlaps
50 or other suitable fibrous or woven material, as represented at D. In the operation of the fan-blower the fan draws the air from the chill-room A and ejects the same at the outlet *a;* consequently the air is drawn inward through the fibrous or woven material D, thence up through the opening C, in the floor of the

chill-room, into the said chill-room, and, passing through the same, comes in contact with the meats placed therein for preservation or storage. Inasmuch as this air is drawn through the burlaps or equivalent material, and inasmuch as such fibrous or woven material possesses the powers hereinbefore explained of separating from the air the germs which when brought into contact with meat produce incipient decay in the surface of the latter, thereby destroying the flavor and bloom of the meat, as hereinbefore set forth, it follows that the air as it passes into the refrigerator is
51 purified from these germs, and consequently no hurtful effect is exerted upon the surface of the meat when the latter comes in contact with the air, the contact of the refrigerated air with the meat being, of course, necessary to a proper refrigeration and preservation from rapid decay. It is to be understood that air drawn into the refrigerator, as just hereinbefore explained, may be cooled by any of the methods known in the art—as, for example, by passing it through a box of ice in contact with a coil of pipe or other metallic substance made cold by means of a freezing liquid. The refrigerator, instead of the construction shown in Fig. 3, as just explained, may be made as represented in Fig. 4. In this case the chill-room A is closed against access of external air, and is provided with a fan blower, B, the inlet of which opens to the chill-room A, the outlet of
52 which opens into an ice-box, E, the bottom of which latter has an opening, *g*, the operation of the fan drawing the air from the top of the chill-room, forcing it into the ice-box, down through the latter in contact with ice which cools it, and thence out through the opening *g* to the bottom of the chill-room, the air being thus circulated continuously within the latter. In this case the germ-absorbent—in other words, the burlaps or other fibrous or woven material—is placed across the outlet *g*, so that the air, continually passing through said germ-absorbent or woven material, has the germs of decay absorbed and retained by said material, so that as the air comes in contact with the meat placed in the chill-room A it is rendered perfectly innocuous and incapable of inciting that incipient decomposition by which ordinarily the flavor of the surfaces of the meat and also the bloom thereon is destroyed.
53 Instead of employing a circulation of air produced by the forcing action of a fan, B', or the like, reliance may be had simply upon the increased density of the air passing in through an opening, *m*, at the top of the ice-box, thence in contact with the ice in the ice-box E, and back to the chill-room through the outlet *g*, the latter covered, as in Fig. 2, with the germ-absorbent or fibrous or woven material. As the air comes in contact with the ice it is cooled, rendered heavier, caused to descend, and as it passes out to the chill-room A it forces upward the less refrigerated air and insures its passage through the openings *m* back to the ice-box, a continuous circulation of air being thus produced; and, inasmuch as the outlet *g* is provided in this case, as in Fig. 4, with the absorbent material, it follows that the continuous passage of the air through the germ-absorbing material causes the germs to be absorbed by said material, so that the air in this,

as in the previous, instance is enabled to come in contact with the meat without communicating thereto the germs which destroy the quality of its surface, as hereinbefore set forth.

Having reference now to Figs. 6, 7, and 8—A is the building, room, or apartment, as the case may be, either with or without windows and either closed to access of external air or provided with inlets and outlets for the entrance of such air and the subsequent escape. B′ is a fibrous material, which may comprise simply a sheet of burlaps or other woven stuff of any textile substance, through which the air is caused to pass by the action of the fan blower. This fan blower is represented at C, and may be arranged in any such way as will cause the air to pass either through the room, building, or apartment to be ventilated or over and over again within said chamber up through the fibrous material B′.

Having reference, first, to Fig. 6—

Inlets to admit external air may be provided at a'. Outlets from the interior of A^x may be provided, as shown at b^x, and connecting with an outlet pipe, A′, at the upper end of which is arranged the fan blower C, said fan blower being operated by any suitable mechanism to exhaust the air from the interior of A^x and expel the same to the external atmosphere, as shown by the arrow in said Fig. 6. The fibrous material B′ is drawn across one end of A^x in suitable relation with the inlets a^x—in other words, so that the air in passing into A^x will be caused to pass through the fibrous material B′, all the air entering A^x being thereby strained, as it were, through this fibrous material. Now, as I have demonstrated by experiment, this fibrous material B′ being composed of some textile material—as, for example, hemp, jute, cotton, linen, or the like—and being made of suitable thickness, mesh, &c., which are simply matters of detail and can be readily provided, said material absorbs or withdraws from the air all the germs of disease and those causes which provoke incipient putrefaction in organic substances as well as those which more or less remotely produce noxious effects. By this means, therefore, I am enabled to purify the atmosphere within A^x and render the same more wholesome, more pleasant, and better fitted either for the health of occupants of the building, room, or apartment A^x or for any other purpose for which a pure atmosphere is requisite or desirable.

Having reference now to Fig. 7—

The principle of operation is substantially the same as that shown in Fig. 6, but the construction of the apparatus by which said principle is carried into effect is modified in some degree. For example, the inlet openings are formed in the bottom A^{xx}, which latter may, if desired, constitute the body of a rai - way car, or may be stationary, like A^x, in Fig. 6, and the fibrous material B′ is placed over said floor or bottom in such manner that the air entering through the openings a in the latter is purified thereby in the same manner as in Fig. 6, previously herein explained, the air passing outward during such operation of the apparatus through the fan C in substantially the same manner as in Fig. 6. It is to be noticed, however, that, when made as in Fig. 7, a

valve, c^x, is provided, which may be turned upward to close the outlet of the fan blower C, and in like manner another valve, d^x, is provided, which entirely shuts off the inlet of the air to the openings *a*, and that, moreover, a pipe, *f*, is extended from the outlet of the fan blower C down through the floor to the space beneath said floor, so that, the parts being arranged as just hereinbefore explained,
58 the operation of the fan blower, instead of drawing external air into A^x and expelling it therefrom, causes the air to be drawn from below the floor up through the fibrous material B′, thence through the fan blower and downward through the pipe *f* to the space below the floor, whence it is again drawn upward through the material B′, and so continuously circulated through A^x, the air being purified by its constant passage through the fibrous material B in the same manner as in the other operation, hereinbefore explained, of the apparatus.

Having reference now to Fig. 8—

The operation is the same as represented in Fig. 6, except that the fibrous material B, instead of comprising a large sheet, is placed in separate pieces or smaller sheets directly over the inlet openings, the external air being drawn in through the inlet openings and thence out through the fan blower C, and the fibrous mate-
59 rial B′ serving the same purpose as in Figs. 6 and 7, hereinbefore fully described.

I do not limit myself to any special construction of refrigerator, nor to any particular texture of germ-absorbing or fibrous or woven material so long as said fibrous or woven germ-absorbing material performs the functions herein explained in substantially the manner herein set forth.

It is to be understood, however, that I do not claim the use of charcoal as a filter, through which the air shall be passed, such use of charcoal having been known before my invention and being not only ineffectual, but different in every respect from my said invention.

Having described the nature of my said invention, to which I have given the name of Bate's improved system of ventilation, refrigeration, &c., I beg to state that, so far as concerns this present and particular application for letters patent, I disclaim all
60 other systems now in use; but what I here claim as my invention is—

1st. The herein-described process of preserving meat during transportation and storage by enveloping the same in a covering of fibrous or woven material and subjecting it when thus enveloped to the action of a currant of air of suitably low temperature, substantially as and for the purposes set forth.

2nd. A refrigerator constructed with a germ-absorbent of fibrous or woven material provided for use in connection with a current of air of suitably low temperature caused to pass through or to circulate within the refrigerator, all substantially as and for the purpose herein set forth.

3rd. The herein-described combination, with a building, room, or apartment, of a fan blower and a fibrous material capable of ab-

sorbing the germs of disease, incipient decay, &c., from at-
61 mospheric air, all substantially as and for the purpose herein set forth.

New York, 9th December, 1876.

JOHN JONES BATE.

Signed in the presence of—
HENRY EICHLING.
EDWARD HOLLY.

Certified to be the specification referred to in the affidavit of John Jones Bate, made before me this 9th day of December, 1876.

JAMES K. AYMAR,
Notary Public, N. Y. County.

(Here follows diagrams marked pp. 62, 63, & 64.)

65 CANADA.

Patent of Invention No. 6938.

Whereas John Jones Bate, of the city of Brooklyn, in the State of New York, one of the United States of America, merchant, has, in pursuance of "the patent act of 1872," by his petition to the commissioner of patents, stated that he has invented new and useful improvements on apparatus and processes for ventilation, refrigeration, &c., the title and name whereof is "Bate's improved system of ventilation, refrigeration, &c.," not known or used by others before his invention thereof, and not being at the time of his application in public use or on sale for more than one year previous to his said application, in Canada, with his consent or allowance, and has elected his domicile at the city of Montreal, in the Province of Quebec, in Canada; and

Whereas the said John Jones Bate has also complied with the other requirements of the said act:

The present patent grants to the said John Jones Bate, his executors, administrators, and assigns, for the period of five years from the date of these presents, the exclusive right, privilege, and liberty of making, constructing, and using and vending to others to be used the said invention of John Jones Bate, and which is called or known by the title or names of "Bate's improved system of ventilation, refrigeration, &c.," and whereof a short description is as follows:

It consists, 1st, in the process of preserving meat during transportation and storage by enveloping the same in a covering of fibrous or woven material and subjecting it when thus enveloped to the action of a current of air of suitably low temperature; 2nd, in a refrigerator constructed with a germ-absorbent of fibrous or woven material provided for use in connection with a current of air of suitably low temperature caused to pass through or to circulate within the refrigerator; 3rd, in the combination, with a building, room, or apartment, of a fan blower and a fibrous material capable of absorbing the germs of disease, incipient decay, &c., from atmospheric air.

But for fuller detail of the invention reference must be had to the specification and drawing, one duplicate whereof is hereunto annexed and forms an essential part of this patent:

Provided, That the grant hereby made is subject to adjudication before any court of competent jurisdiction; and, further, that this patent is subject to the condition that the same and all the rights and privileges hereby granted shall cease and determine and the patent shall be null and void at the end of two years from the date hereof, unless the patentee, his executors, administrators, or his assignee or assignees, shall within that period have commenced and shall after such commencement continuously carry on in Canada the construction or manufacture of the invention hereby patented, in such manner that any person desiring to use it may obtain it or cause it to be made for him at a reasonable price, at some manufactory or establishment for making or constructing it in Canada.

And, further, that this patent shall be void if, after the expiration of twelve months from the granting hereof, the patentee, his executors or administrators, or his assignee or assignees for a whole or a part of his interest in the patent, imports or causes to be imported into Canada the invention for which this patent is granted.

In testimony whereof the Honorable Isaac Burpee, one of the Queen's privy council for Canada, has hereunto signed his name, and the seal of the patent office has been hereunto affixed, at the city of Ottawa, in the Dominion of Canada, this ninth day of January, in the year of our Lord one thousand eight hundred and seventy-seven.

ISAAC BURPEE.

Countersigned:

J. C. TACHÉ,
Deputy Commissioner.

[On margin.]

Extended for a second period of five years, under No. 13812, from the ninth day of January, one thousand eight hundred and eighty-two.

A. J. CAMBIÉ,
Act'g Deputy Commissioner.

Extended for a third period of five years, under No. 13813, from the ninth day of January, one thousand eight hundred and eighty-seven.

A. J. CAMBIÉ,
Act'g Deputy Commissioner.

Certificate No. 2603, bearing date the thirteenth day of July, 1883, of the judgement of the superior court, Montreal, in the case of the Honorable Sir Alexander Campbell, plaintiff, *vs.* John Jones Bate, defendant, voiding patent No. 6938, has this day been filed in the

patent office and this entry made on the margin of the said patent, in accordance with the 30th section of the patent act of 1872.

Patent office, Ottawa, July 14th, 1883.

[L. S.]

A. J. CAMBIÉ,
Act'g Deputy Commissioner.

66 [Endorsed:] Canada. Patent of invention in favor of "John Jones Bate," for "Bate's improved system of ventilation, refrigeration, &c." Issued on the 11th day of January, 1877, and registered, under No. 6938, in the patent office at Ottawa. J. C. Taché, deputy commissioner.

Certificate No. 2603, bearing date the 30th June, 1886, of the judgement of the superior court, Montreal, in the case of the Honorable Sir Alexander Campbell, plaintiff, *vs.* John Jones Bates, defendant, and The Cunard Steamship Co. and others, third op-onents, and the Honorable John D. C. Thompson, plaintiff, "*par reprise d'instance*," annulling the judgement rendered by the said superior court on the 9th day of July, 1883, with reference to patent No. 6938, and setting the said judgement aside and declaring the same to be null and void and of no effect, to all intents and purposes, and declaring that the patent in question is not void *ab initio*, has this day been filed in the patent office and this entry made on the margin of the said patent, in accordance with the 30th dec. of the patent act of 1872.

Patent office, Ottawa, 8th day of July, 1886.

A. J. CAMBIÉ,
Act'g Deputy Commissioner.

67 CANADA.

Extension of Duration of Patent No. 13812.

Whereas by "the patent act of 1872" it is, amongst other things, provided that patents of invention or discovery issued by the patent office shall be valid for a period of five, ten, or fifteen years, but at or before the expiration of the said five or ten years the holder thereof may obtain an extension of the patent for another period of five years, and after those second five years may again obtain a further extension for another period of five years, but not in any case to exceed a total period of fifteen years; and

Whereas a patent bearing date on the ninth day of January, in the year of our Lord one thousand eight hundred and seventy-seven, was granted to John Jones Bate, of the city of Brooklyn, in the State of New York, one of the United States of America, merchant, for a period of five years from the date of the said patent of invention, therein called or known by the title or name of "Bate's improved system of ventilation, refrigeration, &c.," and which patent was and is subject to the provisos therein contained:

The present patent grants to the said John Jones Bate, his executors, administrators, and his assigns, for another period of five years, to commence and be computed on and from the ninth day of Jan-

uary, which will be in the year one thousand eight hundred and eighty-two, the exclusive right, privilege, and liberty of making, constructing, and using, and vending to others to be used, the said invention of John Jones Bate, and which is called or known by the title or name of "Bate's improved system of ventilation, refrigeration, &c.," and whereof a short description is as follows:

It consists, 1st, in the process of preserving meat during transportation and storage by enveloping the same in a covering of fibrous or woven material and subjecting it when thus enveloped to the action of a current of air of suitably low temperature; 2nd, in a refrigerator constructed with a germ-absorbent of fibrous or woven material provided for use in connection with a current of air of suitably low temperature caused to pass through or to circulate within the refrigerator; 3rd, in the combination, with a building, room, or apartment, of a fan blower and a fibrous material capable of absorbing the germs of disease, incipient decay, &c., from atmospheric air; and which said first-named patent was issued to the said John Jones Bate on the ninth day of January, in the year of our Lord one thousand eight hundred and seventy-seven, bearing the number 6938, and under the signature of the Honorable Isaac Burpee, one of the Queen's privy council for Canada, and countersigned by J. C. Taché, deputy commissioner, and is hereunto annexed under the seal of the patent office.

And this extension of duration of patent is granted subject to the provisos and conditions in the original patent, hereunto annexed, mentioned and contained.

In testimony whereof the Honorable Adolphe Pierre Caron, one of the Queen's privy council for Canada, has to this extension of duration of patent in duplicate signed his name, and the seal of the patent office has been hereunto affixed, at the city of Ottawa, in the Dominion of Canada, this twelfth day of December, in the year of our Lord one thousand eight hundred and eighty-one.

[L. S.] ADOLPHE P. CARON.

Countersigned:
A. J. CAMBIÉ,
Act'g Deputy Commissioner.

68 [Endorsed:] Canada. Extension of duration of patent in favor of John Jones Bate for "Bate's improved system of ventilation, refrigeration, &c.," issued on the 12th day of December, 1881, and registered, under No. 13812, in the patent office at Ottawa. A. J. Cambié, act'g deputy commissioner.

69 CANADA.

Extension of Duration of Patent 13813.

Whereas by "the patent act of 1872" it is, amongst other things, provided that patents of invention or discovery issued by the patent office shall be valid for a period of five, ten, or fifteen years,

but at or before the expiration of the said five or ten years the holder thereof may obtain an extension of the patent for another period of five years, and after those second five years may again obtain a further extension for another period of five years, but not in any case to exceed a total period of fifteen years; and

Whereas a patent, bearing date on the ninth day of January, in the year of our Lord one thousand eight hundred and seventy-seven, was granted to John Jones Bate, of the city of Brooklyn, in the State of New York, one of the United States of America, merchant, for a period of five years from the date of the said patent of invention, therein called or known by the title or name of "Bate's improved system of ventilation, refrigeration, &c.," and which patent was and is subject to the provisos therein contained; and

Whereas a patent, bearing date the twelfth day of December, in the year of our Lord one thousand eight hundred and eighty-one, was granted to the said John Jones Bate, extending the duration of the said original patent for the period of five years from the ninth day of January, in the year of our Lord one thousand eight hundred and eighty-two, subject to the provisos in the said original patent mentioned and contained:

The present patent grants to the said John Jones Bate, his executors, administrators, and his assigns, for another period of five years, to commence and be computed on and from the ninth day of January, which will be in the year one thousand eight hundred and eighty-seven, the exclusive right, privilege, and liberty of making, constructing, and using and vending to others to be used the said invention of John Jones Bate, and which is called or known by the title or name of Bate's improved system of ventilation, refrigeration, &c., and whereof a short description is as follows:

It consists, 1st, in the process of preserving meat during transportation and storage by enveloping the same in a covering of fibrous or woven material and subjecting it when thus enveloped to the action of a current of air of suitably low temperature; 2nd, in a refrigerator constructed with a germ-absorbent of fibrous or woven material provided for use in connection with a current of air of suitably low temperature caused to pass through or to circulate within the refrigerator; 3rd, in the combination, with a building, room, or apartment, of a fan blower and a fibrous material for absorbing the germs of disease, incipient decay, &c., from atmospheric air, and which said first-named patent was issued to the said John Jones Bate on the ninth day of January, in the year of our Lord one thousand eight hundred and seventy-seven, bearing the number 6938 and under the signature of the Honorable Isaac Burpee, one of the Queen's privy council for Canada, and countersigned by J. C. Taché, deputy commissioner, and is hereunto annexed, under the seal of the patent office.

And this extension of duration of patent is granted subject to the provisos and conditions in the original patent, hereunto annexed, mentioned and contained.

In testimony whereof the Honorable Adolphe Pierre Caron, one of the Queen's privy council for Canada, has to this extension of

duration of patent in duplicate signed his name, and the seal of the patent office has been hereunto affixed, at the city of Ottawa, in the Dominion of Canada, this thirteenth day of December, in the year of our Lord one thousand eight hundred and eighty-one.

[L. S.] ADOLPHE P. CARON.

Countersigned :

A. J. CAMBIÉ,
Act'g Deputy Commissioner.

70 [Endorsed :] Canada. Extension of duration of patent in favor of John Jones Bate for "Bate's improved system of ventilation, refrigeration, &c.," issued on the 13th day of December, 1881, and registered, under No. 13812, in the patent office at Ottawa. A. J. Cambié, act'g deputy commissioner.

71 3.

Petition, etc., to Extend Bate Canadian Patent.

DEPARTMENT OF AGRICULTURE, PATENT OFFICE,
OTTAWA, CANADA, *Feb. 24th*, 1887.

Certified to be a true and correct copy of the original petition, correspondence, receipt, and wrapper relating to the extensions of patent No. 6938, granted to John Jones Bate on the 9th day of January, 1877, which said extensions are numbered 13812 and 13813 and dated December 12 & 13, 1881, respectively.

As witness the seal of the patent office, hereto affixed.

[SEAL.] H. CASGRAIN,
Act'g Deputy Com'r of Patents.

[Patent Office, Canada, Dec. 5, 1881.]

To the commissioner of patents, Ottawa :

The petition of John Jones Bate, of the city of Brooklyn, in Kings county, in the State of New York, one of the United States of America, merchant, sheweth—

72 That on the 9th day of January, A. D. 1877, your petitioner obtained a patent for the period of five years from the said date for new and useful improvements on apparatus and process for ventilation, refrigeration, &c.

That he is the holder of the said patent in trust for the "Bate Refrigerating Company," and therefore prays that it may be extended for another period of ten years.

Signed at New York city this thirtieth day of November, in the year of our Lord one thousand eight hundred and eighty-one.

[Patent Office, Canada, Dec. 5, 1881.]

(Signed) JOHN JONES BATE.

MONTREAL, *Dec. 3rd*, 1881.

To the honorable the commissioner of patents, Ottawa.

SIR: I herewith enclose the application of J. J. Bate for extension of L. patent No. 6938, and forty dollars, for ten years.

I have the honor to be, sir, your obedient servant,

CHARLES G. C. SIMPSON,
M.

Paid. W. J. L.

73 PATENT OFFICE, CANADA.

[Patent Office, Canada, Dec. 5, 1881.]

Received from Bate $40.00.
Fee on ——.

A. J. CAMBIE,
p. W. J. L.

74 4.

Canadian Judgment of July 9, 1883.

PROVINCE OF QUEBEC, *District of Montreal:*

Superior Court for Lower Canada, the ninth day of July, one thousand eight hundred and eighty-three.

Present: The Hon. Mr. Justice Torrance.

[Law stamp. $1. Dollar. $1. Province of Quebec. One dollar. Canceled.]
[Law stamp. 20 cts. Quebec. Canceled.]

The Honorable Sir ALEXANDER CAMPBELL, of the City of Ottawa, in the County of Carleton and Province of Ontario, in His Quality of Minister of Justice and Attorney General of Her Majesty in and for the Dominion of Canada, Plaintiff,

vs.

JOHN JONES BATE, of Brooklyn, in the County of Kings and State of New York, One of the United States of America, Merchant, in His Capacity of Trustee for Certain Purposes of The Bate Refrigerating Company, a Body Politic and Corporate, Having its Principal Place of Business in the City of New York, in the said State of New York, Defendant. } No. 2603.

75 The court, having heard the parties upon the merits of this cause, examined the proceedings and proof of record, heard the witness for plaintiff, and having deliberated, considering that by 25 Vic., cap. 26, sec. 15, of Canada, the application for a patent shall deliver to the commissioner of patents, referred to in said act, unless specially dispensed from so doing for some good reason, a neat working *medal*, seeing that such *medal* was not delivered till eighteen months after the issue of the patent in question in this cause, and that such delivery had not been dispensed with before

such issue, doth overrule defendant's plea and grant the conclusions of the information in this cause fyled, and doth, in consequence, declare that the patent of invention hereinafter described was improperly and illegally granted, and that the same was granted and issued and registered without jurisdiction and without authority, and that the same was and is *ab*
76 *initio* null and void and insufficient to secure for the defendant any monopoly such as therein purports to be granted to him, to wit, a certain patent of invention, issued out of the Patent Office for the Dominion of Canada on the eleventh day of January, eighteen hundred and seventy-seven, known and designated and called Bate's improved system of ventilation, refrigeration, &c*o.*, granting to John Jones Bate, of the city — of New York, one of the United States of America, for the period of five years from the ninth day of January, one thousand eight hundred and seventy-seven, the exclusive right, privilege, and liberty of making, constructing, and using, and vending to others to be used, the said invention, whereof a short inscription is as follows:

"It consist-, 1°, on the process of preserving meat during transportation and storage by enveloping the same in a covering of fibrous or woven material and subjecting it, when thus enveloped, to the action of a current of air at suitably low temperature;
77 2°, in a refrigerator constructed with a germ-absorbant of fibrous or woven material provided for use in connection with a current of air of suitably low temperature caused to pass through or to circulate within the refrigerator; 3°, in a combination, with a building, room, or apartment, of a fan blower and a fibrous material capable of absorbing the germs of disease, incipient decay, and from atmospheric air," said patent bearing date on the ninth day of January, eighteen hundred and seventy-seven, and enregistered in the patent office, at Ottawa, on the eleventh day of the same month; and the court doth further cancel and annull *ab initio, a toutes fins que de droit*, the said patent of invention and the renewals thereof, and the transfer thereof, and the registrations thereof, the whole with costs distraits to Messrs. Archibald and McCormick, plaintiff's attorneys.

(True copy.)

[Seal Superior Court, Lower Canada.]

GEO. H. KERNICK,
Deputy Proth'y Sup'r Court, Dist. of Mont'l.

78 [Vignette.]

CONSULATE GENERAL OF THE UNITED STATES OF AMERICA FOR THE BRITISH NORTH AMERICAN PROVINCES, MONTREAL, CANADA.

I, the undersigned, —— ——, consul general of the United States of America for the British North American provinces, do hereby certify and make known that George H. Kernick, whose signature is signed to the annexed instrument in writing, is and was at the

signing of the same an acting deputy prothonotary of the superior court, in the district of Montreal and Province of Quebec, commissioned and authorized to act as such, and that full faith and credit are due to his official acts.

Given under my hand and the seal of this consulate general, at Montreal, this eighteenth day of February, A. D. 1887.

[Seal Consulate General of the United States, Montreal.]

WENDELL A. ANDERSON,
Consul General of the United States of America.

79 5.

Canadian Judgment of June 30, 1886.

CANADA, *Province of Quebec, District of Montreal:*

In the Superior Court for Lower Canada, on the thirtieth day of June, one thousand eight hundred and eighty-six.

Present: The Honorable Mr. Justice Charles Gill, J. S. C.

[Law stamp. $2. Dollars. $2. Province of Quebec. Two dollars. Canceled.]

The Honorable Sir ALEXANDER CAMPBELL, of the City of Ottawa, in the County of Carleton and Province of Ontario, in His Quality as Minister of Justice and Attorney General of Her Majesty in and for the Dominion of Canada, Plaintiff,

vs.

JOHN JONES BATE, of Brooklyn, in the County of Kings and State of New York, One of the United States of America, Merchant, in His Capacity of Trustee for Certain Purposes of The Bate Refrigerating Company, a Body Politic and Corporate, Having its Principal Place of Business in the City of New York, in the said
80 State of New York, Defendants, } No. 2603.

and

THE CUNARD STEAMSHIP COMPANY, a Body Politic and Corporate, Having its Chief Place of Business in the City of New York, in the State of New York, One of the United States of America; Benjamin W. Gillett, Morillo H. Gillett, and David H. Shearman, all Three of the said City of New York, Traders, Opposants,

and

The Honorable JOHN D. S. THOMPSON, of the City of Ottawa, in the Province of Ontario, Minister of Justice and Attorney General for the Dominion of Canada, Plaintiff *par Reprised Instance.*

The court having heard the parties, by their respective counsel, upon the merits and issue joined on the *tierce* opposition fyled to the final judgment rendered in this cause on the ninth day of July,

eighteen hundred and eighty-three, examined the proceedings and proof of record and evidence adduced and on the whole deliberated.

Whereas it has been proved that on the ninth of January,
81 eighteen hundred and seventy-seven, a patent of invention called "Bate'- improved system of ventilation, refrigeration, &c., &c.," was issued by the Patent Office of Canada to John Jones Bate, of the city of Brooklyn, in the State of New York, United States of America, granting him for five years from the above date the exclusive privilege of making, using, and vending his said invention in Canada, which said patent was, on the twelfth of December, eighteen hundred and eighty-one, renewed for five years more, to run from the ninth of January, eighteen hundred and eighty-two, and on the thirteenth of December, eighteen hundred and eighty-one, renewed further for five additional years, to run from the ninth of January, eighteen hundred and eighty-seven, to the like day and month in eighteen hundred and ninety-two, the said John Jones Bate having also obtained a patent in the United States of America for his said invention on the twentieth of November, eighteen hundred and seventy-seven, for seventeen years, and both these
82 patents were by him assigned to the Bate Refrigerating Company on the twenty-second of November, eighteen hundred and twenty-seven; that the present *tiers opposants*, having infringed the said patent in the United States, a writ of injunction issued from the United States circuit court, district of New Jersey, at the instance of the Bate Refrigerating Company, was served upon them and sustained by decree entered November fourteenth, eighteen hundred and eighty-one, but subsequently, on petition presented on the twenty-ninth of May, eighteen hundred and eighty-two, the said injunction was dissolved on the ground that by the law of the United States the patent obtained there for seventeen years had expired at the end of the time for which the Canadian patent previously taken out had been issued—that is to say, at the end of five years, reckoning from the ninth of January, eighteen hundred & seventy-seven; whereupon the said Bate Refrigerating Company and the said John Jones Bate, acting collusively with one Benjamin Holman, of Montreal, caused him to petition the attorney general for the Province of Quebec to issue a writ of *scire*
83 *facias*, issued from this superior court, against themselves, Bate & Bate Refrigerating Company, to annul the said Canadian patent on the ground that a neat working model of said invention had not been deposited in the patent office at ottawa before the said patent was granted, as required by law; and the said attorney general, unaware of the connivency between Holman and the present defendants, did allow his name to be used for the object in view; but both the superior court and the court of review having decided that the said attorney general for the Province of Quebec was not the officer at whose instance the said writ of *scire facias* should have issued, the said defendants, still acting in collusion with the same Benjamin Holman, had him to petition the attorney general for the Dominion of Canada to be allowed to use his name under the conditions provided by law, in order that the present action and writ of *scire facias*

might be brought before the court to have the said Canadian
84 patent declared null and void *ab initio* for want of formality in the granting of it, as no model had been previously deposited.

That the said defendants *fyled* an affirmative plea, admitting that the commissioner of patents had not granted the dispensation from *fyling* such model. One witness was heard, but not cross-examined, and the judgment now complained of followed, declaring the Canadian patent null *ab initio* for want of model; that on the strength of the said judgment the defendants went back to the said circuit court for the district of New Jersey and obtained an order reinstating the injunction which had been dissolved as aforesaid and prohibiting the present opposants to use the said invention.

Considering that the said *tiers opposants* who were not party to the suit, but whose interests suffer from the effects of said judgment rendered in this cause on the ninth of July, eighteen hundred and eighty-three, inasmuch as they have been deprived of the
85 right of using said invention through the instrumentality of said judgment, are now entitled to be heard and to urge against it all legal grounds they may have, altho' their interest thereby affected may not be in this country, for their adversary, having used against them in the United States the authority of the judgment, a decision of this court, it is but justice to allow them to attack here—the only place where it can be attacked—the instrument so used elsewhere against them;

Considering it has been proved that all these legal proceedings have been had and the said judgment arrived at through the fraud to the law and collusion of the said John Jones Bate, Bate Refrigerating Company, & Benjamin Holman, deceiving the attorney general, the advocates, and the court, employing and paying counsel on both sides, as well, seemingly, against themselves as on their apparent behalf;

Considering that the deposit of a model of the invention to be patented is not according to our law a matter essential to the
86 granting of the patent, but can be dispensed with at the discretion of the commissioner of patents; that the facts as they have occur-ed in this case—that is, preparing, drafting, and registering the patent before the model was deposited—would in themselves constitute a dispensation of model; but even that argument need not be resorted to, for it is now shown that the required model was in fact asked for and deposited before the patent was issued from the department and delivered to the patentee, altho' the patent or paper writing granting the patentee's petition had been prepared and signed beforehand—a practice proved to be customary in the department, and in fact not materially violating the law;

Considering the *tiers opposants* have served and *fyled* their *tiers* opposition in due time, and delay after the judgment complained of was made known to them—doth declare the said *tierce* oppo-
87 sition good and valid, and, maintaining the same, doth revoke and annul the said judgment rendered in this cause on the ninth day of July, in the year one thousand eight hundred and

eighty-three, as being contrary to the rights and interests of the said *tierce opposants*, and as having been obtained collusively and fraudulently through the connivency of the said John Jones Bate, the Bate Refrigerating Company, and Holman, and as not having been rendered *en pleine connaissance decause*, but in the absence in the record of the whole facts as now shown, and in consequence thereof contrary to law.

And it is further adjudged and declared that the said patent of the ninth day of January, eighteen hundred and seventy-seven, was legally issued, and the said patent and the renewals thereof have been obtained legally, and, far from being null *ab initio*, the said patent has never ceased to be since the issuing thereof and is still in full force, vigor, & effect through the renewal of the twelfth of December, eighteen hundred and eighty-one, and as, moreover,
88 declared by the statute of eighteen hundred and eighty-three (46 Vic., c. 19); and the said judgment, being henceforth annulled and set aside as aforesaid, is declared to be null and void and of no effect to all legal intents & purposes, and especially as regards the said *tiers opposants;* and the court, proceeding to render the judgment which ought to have been rendered, doth dismiss the said suit at law, writ, and proceedings with costs distraits to Mess-s. Lacoste, Globensky, Bisaillon & Brosseau, attorneys for *tiers opposants.*

(True copy.) GEO. H. KERNICK,
Deputy Proth'y Superior Court, Dist. of Montreal.

89 [Vignette.]

CONSULATE GENERAL OF THE UNITED STATES OF AMERICA FOR THE BRITISH NORTH AMERICAN PROVINCES, MONTREAL, CANADA.

I, the undersigned, —— ——, consul general of the United States of America for the British North American provinces, do hereby certify and make known that Geo. H. Kernick, whose signature is signed to the annexed instrument in writing, is and was at the signing of the same an acting deputy prothonotary, superior court, district of Montreal, Province of Quebec, commissioned and authorized to act as such, and that full faith and credit are due to his official acts.

Given under my hand and the seal of this consulate general, at Montreal, this 21st day of December, A. D. 1886.

[Seal Consulate General of the United States, Montreal.]

WENDELL A. ANDERSON,
Consul General of the United States of America.

90 6.

Certificate of Date of Application for Canadian Patent.

DEPARTMENT OF AGRICULTURE, PATENT OFFICE,
OTTAWA, CANADA, *Jan'ry 5th*, 1887.

This is to certify that the application on which patent No. 6938 — granted to John Jones Bate, for "Bate's improved system of ventilation, refrigeration, &c.," was filed in this office on the 19th day of December, 1876.

As witness the seal of the patent office hereto affixed.

[SEAL.] H. CASGRAIN,
Act'g Deputy Commissioner of Patents.

91 7.

Certificate of Call for Model and Date of Filing Model.

DEPARTMENT OF AGRICULTURE, PATENT OFFICE,
OTTAWA, CANADA, *Jan'ry 5th*, 1887.

This is to certify that in the matter of letters patent of the Dominion of Canada No. 6938, granted to John Jones Bate, for "Bate's improved system of ventilation, refrigeration, &c.," and dated Jan'ry 9th, 1877, the commissioner of patents of the Dominion of Canada called for a model of the invention to be filed in the patent office on the 12th day of Jan'ry, 1877, which appears to have been received in this office on or about the 26th day of June, 1878, when the patent was mailed.

As witness the seal of the patent office hereto affixed.

[SEAL.] H. CASGRAIN,
Act'g Deputy Commissioner of Patents.

92 8.

Certificate as to Furnishing Model.

DEPARTMENT OF AGRICULTURE, PATENT OFFICE,
OTTAWA, CANADA, *Jan'ry 5th*, 1887.

This is to certify that in the matter of letters patent of the Dominion of Canada No. 6938, granted to John Jones Bate and dated Jan'ry 9th, 1877, the furnishing of the model to this office by the applicant, on the 26th day of June, 1878, in said case was a prerequisite to the delivery of the said letters patent.

As witness the seal of the patent office hereto affixed.

[SEAL.] H. CASGRAIN,
Act'g Deputy Commissioner of Patents.

93 9.

Affidavit of John J. Bate.

UNITED STATES OF AMERICA,
Southern District of New York:

Circuit Court of the United States, District of Massachusetts. In Equity.

BATE REFRIGERATING COMPANY
v.
GEORGE H. HAMMOND AND COMPANY.

John J. Bate, being duly sworn, deposes and says as follows:

I am the president of the corporation complainant. I have read a copy of the petition filed in the Canadian Patent Office in the matter of the so-called extension of the Canadian letters patent No. 6938. (A copy of the petition referred to is hereto annexed.) The letters patent referred to, upon being issued, on or about June 26th, 1878, after the filing of the model of the invention, took effect as of January 9th, 1877, and in that sense, and in that sense alone, as I am informed and believe, were "obtained" on January 9th, 1877. In making such application for extension I simply followed the forms prescribed by the Canadian Patent Office in such connection.

JOHN J. BATE.

Sworn to before me this 9th day of April, 1887.
[SEAL.] GEORGE W. MIATT,
Notary Public.

94 To the commissioner of patents, Ottawa:

The petition of John Jones Bate, of the city of Brooklyn, in Kings county, in the State of New York, one of the United States of America, merchant, showeth—

That on the 9th day of January, A. D. 1877, your petitioner obtained a patent for the period of five years from the said date for new and useful improvements on apparatus and process for ventilation, refrigeration, &c.

That he is the holder of the said patent in trust for the "Bate Refrigerating Company," and therefore prays that it may be extended for another period of ten years.

Signed at New York city this thirtieth day of November, in the year of our Lord one thousand eight hundred and eighty-one.

[SEAL.] JOHN JONES BATE.

95 10.

Patent Laws of Canada.

[Coat of arms.]

35TH VICTORIA.

CHAP. 26.

An act respecting patents of invention. (Assented to 14th June, 1872.)

Preamble. Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Patent Office Constituted.

Minister of agriculture to be commissioner of patents of invention. **1.** There shall be attached to the department of agriculture as a branch thereof, an office to be called the patent office, and the minister of agriculture for the time being shall be the commissioner of patents; and it shall be the duty of the said commissioner to receive all applications, fees, papers, documents, and models for patents, and to perform all acts and things requisite to the granting and issuing of patents of invention; and he shall have the charge and custody of the books, records, papers, models, machines, and other things belonging to the said office.

Seal to be made and impressions thereof to be received in evidence. **2.** The commissioner shall cause a seal to be made for the purposes of this act, and may cause to be sealed therewith patents and other instruments and copies proceeding from the patent office; and all courts, judges, and other persons whomsoever shall take notice of such seal and receive impressions thereof in evidence in like manner as impressions of the great seal are received in evidence, and shall also take notice of and receive in evidence, without further proof and without production of the originals, copies or extracts certified under the seal of the said office to be copies of or extracts from documents deposited in such office.

Commissioner to make rules. 96 **3.** The commissioner may, from time to time, subject to the approval of the governor in council, make such rules and regulations and prescribe such forms as may appear to him necessary and expedient for the purposes of this act, and notice thereof shall be given in the Canada Gazette, and all documents executed in conformity with the same and accepted by the commissioner shall be held valid, so far as relating to proceedings in the Patent Office.

Publication and effect.

4. The deputy of the minister of agriculture shall be the deputy commissioner of patents of invention, and the governor in council may, from time to time, appoint such clerks and officers under him as may be necessary for the purposes of this act, and such clerks and officers shall hold office during pleasure. No officer or employee of the patent office shall buy, sell, or acquire or traffic in an invention or patent or rights to patents therefor, and every such purchase and sale and every assignment or transfer thereof by or to any officer or employee as aforesaid shall be utterly null and void, but this shall not apply to any original inventor or to the acquisition by bequest.

Deputy commissioner and clerks.

Employés in patent office not to be concerned in patents.

Exception.

5. The commissioner shall cause a report to be prepared annually and laid before Parliament of the proceedings under this act, and shall, from time to time and at least once in each year, publish in the Canada Gazette a list of patents granted, and may, with the approval of the governor in council, cause such specifications and drawings as may be deemed of interest or essential parts thereof to be printed, from time to time, for distribution or sale.

Annual report and list of patents.

Publication of specifications.

Who may Obtain Patents.

6. Any person having invented any new and useful art, machine, manufacture, or composition of matter or any new and useful improvement on any art, machine, manufacture, or composition of matter not known or used by others before his invention thereof, and not being in public use or on sale for more than one year previous to his application, in Canada, with the consent or allowance of the inventor thereof, may, on a petition to that effect presented to the commissioner and on compliance with the other requirements of this act, obtain a patent granting to such person an exclusive property therein; and the said patent shall be under the seal of the Patent Office and the signature of the commissioner or the signature of another member of the privy council, and shall be good and avail to the grantee, his executors, administrators, or assigns, for the period mentioned in such patent; but no patent shall issue for an invention having an illicit object in view nor for any mere scientific principle or abstract theorem.

Any person may obtain a patent for his invention not having been then in public use in Canada for more than one year.

Form of patent.

Proviso: what shall not be patentable.

As to inventions for which foreign patents have been taken out.

7. But an inventor shall not be entitled to a patent for his invention if a patent therefor in any other country shall have been in existence in such country more than twelve months prior to the application for such patent in Canada; and if, during such twelve months, any person shall have commenced to manufacture in Canada the article for which such patent is afterwards obtained such person shall continue to have the right to manufacture and sell such article, notwithstanding such patent; and, under any circumstances, where a foreign patent exists the Canadian patent shall expire at the earliest date at which any foreign patent for the same invention expires.

Representatives of inventor may obtain the patent.

8. The patent may be granted to any person to whom the inventor entitled under the sixth section to obtain a patent has assigned or bequeathed the right of obtaining the same, or, in default of such assignment or bequest, to the executors or administrators or assigns of the deceased inventor.

As to patents for improvements on patented inventions.

9. Any person who has invented any improvement on any patented invention may obtain a patent for such improvement, but shall not thereby obtain the right of vending or using the original invention, nor shall the patent for the original invention confer the right of vending or using the patented improvement.

Proviso.

As to joint application for a patent.

10. In cases of joint applications the patent shall be granted in the names of all the applicants; and in such cases any assignment from one of the said applicants or patentees to the other or to any person shall be registered in like manner as other assignments.

Conditions and Formalities.

Declaration to be made by applicant for a patent.

11. Every inventor before a patent can be obtained shall make oath, or, when entitled by law to make an affirmation instead of an oath, shall make an affirmation, that he verily believes that he is, or, in the case of the inventor being deceased, the applicant shall make oath or affirm that the person whose assignee or representative he is was the inventor of the invention for which the patent is solicited, and that the several allegations in
98 the petition contained are respectively true and correct. Such oath or affirmation may be made before any justice of the peace in Canada; but if the inventor or the applicant is not at the time in Canada the oath or affirmation may be made before any minister plenipotentiary, *chargé*

Before whom.

d'affaires, consul, vice-consul, or consular agent, holding commission under the government of the United Kingdom, or any judge of the country in which the applicant happens at the time to be.

Applicant to elect a domicile in Canada.

12. The petitioner for a patent shall, for all the purposes of this act, elect his domicile at some known and specified place in Canada and mention the same in his petition for a patent.

Particulars required in application.

13. The applicant shall, in his petition for a patent, insert the title or name of the invention, and shall, with the petition, send in a specification in duplicate.

Specification and drawing, form of and what to show.

14. The specification shall correctly and fully describe the mode or modes of operating contemplated by the inventor, and shall state clearly and distinctly the contrivances and things which he claims as new and for the use of which he claims an exclusive property and privilege; it shall bear the name of the place where it is made, the date, and be signed by the inventor, if he be alive (and if not by the applicant), and two witnesses; in the case of a machine the specification shall fully explain the principle and the several modes in which it is intended to apply and work out the same; in the case of a machine, or in any other case where the invention admits of illustration by means of drawings, the applicant shall also, with his application, send in drawings in duplicate showing clearly all parts of the invention; and each drawing shall bear the signature of the applicant or of his attorney, and shall have written references corresponding with the specification; but the commissioner may require further drawings or dispense with any of them, as he may see fit; one duplicate of the specification and of the drawings, if there are drawings, shall be annexed to the patent of which it forms an essential part, and the other duplicate shall remain deposited in the patent office.

Commissioner may require further drawings.

Drawings, how disposed of.

Working model to be delivered to the commissioner.

15. The applicant shall also deliver to the commissioner, unless specially dispensed from so doing for some good reason, a neat working model of his invention on a convenient scale, exhibiting its several parts in due proportion, whenever the invention admits of such model, and shall deliver to the commissioner specimens of the in-

Or specimens of ingredients.

99 gredients and of the composition of matter sufficient in quantity for the purpose of experiment, whenever the invention is a composition of matter; provided such ingredients and composition are not of an explosive character or

Exception as to explosive materials.

otherwise dangerous, in which case they are to be furnished only when specially required by the commissioner, and then with such precautions as shall be prescribed in the said requisition.

Contents, Duration, Surrender, Reissue of Patents and Disclaimers.

Contents of patents.

16. Every patent granted under this act shall contain the title or name of the invention, with a reference to the specification, and shall grant to the patentee, his executors, administrators, and assigns, for the period therein mentioned from the granting of the same, the exclusive right, privilege, and liberty of making, constructing, and using, and vending to others to be used, the said invention, subject, nevertheless, to adjudication before any court of competent jurisdiction.

Conditions.

Duration of patents and periodical extension—not exceeding fifteen years in all.

17. Patents of invention issued by the patent office shall be valid for a period of five, ten, or fifteen years, at the option of the applicant, but at or before the expiration of the said five or ten years the holder thereof may obtain an extension of the patent for another period of five years, and after those second five years may again obtain a further extension for another period of five years, not in any case to exceed a total period of fifteen years in all; and the instrument delivered by the patent office for such extension of time shall be in the form which may be from time to time adopted, to be attached, with reference to the patent and under the signature of the commissioner or of any other member of the privy council in the case of absence of the commissioner.

Form of extension.

Patent or extension to be examined by minister of justice before granted.

18. Every patent and instrument for the extension of time as aforesaid shall, before it is signed by the commissioner or any other member of the privy council and before the seal hereinbefore mentioned is affixed to it, be examined by the minister of justice, who, if he finds it conformable to law, shall certify accordingly, and such patent or instrument may then be signed and the seal affixed thereto, and, being duly registered, shall avail to the grantee thereof.

In certain cases of error, &c., the commissioner may cause a new patent to issue, on amended specification.

19. Whenever any patent shall be deemed defective or inoperative by reason of insufficient description or specification or by reason of the patentee claiming more than he had a right to claim as new, but at the same time it appears that
100 the error arose from inadvertence, accident, or mistake, without any fraudulent or de-

ceptive intention, the commissioner may, upon the surrender of such patent and the payment of the further fee hereinafter provided, cause a new patent, in accordance with an amended description and specification to be made by such patentee, to be issued to him for the same invention for any part or the whole of the then unexpired residue of the period for which the original patent was or might have been, as hereinbefore directed, granted; in case of the death of the original patentee or of his having assigned the patent a like right shall vest in his assignee or legal representative. The new patent and the amended description and specification shall have the same effect in law on the trial of any action thereafter commenced for any cause subsequently accruing as if the same had been originally filed in such corrected form before the issue of the original patent.

Effect of new patent and specification.

20. Similarly, whenever by any mistake, accident, or inadvertence, and without any wilful intent to defraud or mislead the public, a patentee has made his specification too broad, claiming more than that of which he or the party through whom he claims was the first inventor, or has, in the specification, claimed that he or the party through whom he claims was the first inventor of any material or substantial part of the invention patented, of which he was not the first inventor and to which he had no legal right, the patentee may, on payment of the fee hereinafter provided, make disclaimer of such parts as he does not claim to hold by virtue of the patent or the assignment thereof. Such disclaimer shall be in writing and in duplicate and attested in the manner hereinbefore prescribed for a patent, one copy to be filed and recorded in the office of the commissioner, the other copy to be attached to the patent and made a part thereof by reference; and such disclaimer shall thereafter be taken and considered as part of the original specification. Such disclaimer shall not affect any action pending at the time of its being made, except in so far as may relate to the question of unreasonable neglect or delay in making it. In case of the death of the original patentee or of his having assigned the patent a like right shall vest in his assigns or legal representatives, respectively, any of whom may make disclaimer. The patent shall thereafter be deemed good and valid for so much of the invention as is truly the disclaimant's own and not disclaimed, provided it be a material and

Patentee may disclaim anything included in the patent by mistake.

Form.

Disclaimer not to affect pending suits.

In case of death of patentee.

Effect of disclaimer.

substantial part of the invention and definitely distinguished from other parts claimed without right; and the disclaimant shall be entitled to maintain a suit for such part accordingly.

101

Assignment and Infringement of Patents.

Government may use patented invention.

21. The Government of Canada may always use any patented invention, paying to the patentee such sum as the commissioner may report to be a reasonable compensation for the use thereof.

Patents to be assignable.

22. Every patent for an invention, whensoever issued, shall be assignable in law, either as to the whole interest or as to any part thereof, by any instrument in writing; but such assignment, and also every grant and conveyance of any exclusive right to make and use, and to grant to others the right to make and use, the invention patented within and throughout Canada or any part thereof shall be registered in the office of the commissioner in the manner from time to time adopted by the commissioner of patents for such registration; and every assignment affecting a patent for invention shall be deemed null and void against any subsequent assignee, unless such instrument is registered, as hereinbefore prescribed, before the registering of the instrument under which such subsequent assignee may claim.

To be registered on pain of nullity.

Remedy for infringement of patent.

23. Every person who, without the consent in writing of the patentee, makes, constructs, or puts in practice any invention for which a patent has been obtained under this act or any previous act, or procures such invention from any person not authorized to make or use it by the patentee, and uses it, shall be liable to the patentee in an action of damages for so doing; and the judgment shall be enforced and the damages and costs that may be adjudged shall be recovered in like manner as in other cases in the court in which the action is brought.

Action for infringement of patent.

24. An action for the infringement of a patent may be brought before any court of record having jurisdiction to the amount of damages asked for, and having its sittings within the province in which the infringement is said to have taken place, and being, at the same time, of the courts of such jurisdiction within such province, the one of which the place of holding is nearest to the place of residence or of business of the defendant; and such court shall decide the case and deter-

Injunction may issue.

mine as to costs. In any action for the infringement of a patent, the court, if sitting, or
102 any judge thereof in chambers if the court be not sitting, may, on the application of the plaintiff or defendant, respectively, make such order for an injunction restraining the opposite party from further use, manufacture, or sale of the subject-matter of the patent, and for his punishment in the event of disobedience to such order, or for inspection or account, and respecting the same and the proceedings in the action, as the court or judge may see fit; but from such order an appeal shall lie under the same circumstances and to the same court as from other judgments or orders of the court in which the order was made.

Appeal allowed.

25. Whenever the plaintiff fails to sustain his action, because his specification and claim embrace more than that of which he was the first inventor, and it appears that the defendant used or infringed any part of the invention, justly and truly specified and claimed as new, the court may discriminate, and the judgment may be rendered accordingly.

Court may discriminate in certain cases.

26. The defendant in any such action may specially plead as matter of defence any fact or default which, by this act or by law, would render the patent void; and the court shall take cognizance of that special pleading and of the facts connected therewith, and shall decide the case accordingly.

Defence in actions for infringement.

Nullity, Impeachment, and Avoidance of Patents.

27. A patent shall be void if any material allegation in the petition or declaration of the applicant be untrue or if the specifications and drawings contain more or less than is necessary for obtaining the end for which they purport to be made, such omission or addition being wilfully made for the purpose of misleading; but if it shall appear to the court that such omission or addition is simply an involuntary error, and it is proved that the patentee is entitled to the remainder of his patent *pro tanto*, the court shall render a judgment in accordance with the facts and determine as to costs, and the patent shall be held valid for such part of the invention described; and two office copies of such judgment shall be furnished to the patent office by the patentee, one to be registered and to remain of record in the office

Patent may be declared void in certain cases or valid only for part.

Copy of judgment to be sent to patent office.

and the other to be attached to the patent and made a part of it by a reference.

Patent to be conditional for the manufacture in Canada of the thing patented.

28. Every patent granted under this act shall be subject and expressed to be subject to
103 the condition that such patent and all the rights and privileges thereby granted shall cease and determine, and the patent shall be null and void, at the end of two years from the date thereof, unless the patentee or his assignee or assignees shall, within that period, have commenced and shall, after such commencement, continuously carry on in Canada the construction or manufacture of the invention or discovery patented in such manner that any person desiring to use it may obtain it or cause it to be made for him at a reasonable price at some manufactory or establishment for making or constructing it in Canada; and that such patent shall be void if, after the expiration of twelve months from the granting thereof, the patentee or his assignee or assignees, for the whole or a part of his interest in the patent, imports or causes to be imported into Canada the invention for which the patent is granted: And provided always, That in case disputes should arise as to whether a patent has or has not become null and void under the provisions of this section, such disputes shall be settled by the minister of agriculture or his deputy, whose decision shall be final.

And of the patentees not importing it into Canada.

Proviso.

Commissioner may extend the term for manufacture in Canada.

2. Whenever a patentee has been unable to carry on the construction or manufacture of his invention within the two years hereinbefore mentioned, the commissioner may grant to the patentee a further delay on his adducing proof to the satisfaction of the commissioner that he was, for reasons beyond his control, prevented from complying with the same; but no such further delay shall be thus granted in any case in advance of the time hereinbefore prescribed.

Proceedings for impeachment of patent.

29. Any person desiring to impeach any patent issued under this act may obtain a sealed and certified copy of the patent and of the petition, affidavit, specification, and drawings thereunto relating, and may have the same filed in the office of the prothonotary or clerk of the superior court for the Province of Quebec, or of the court of Queen's bench or common pleas for the Province of Ontario, or of the supreme court in the Province of Nova Scotia, or of the court of Queen's bench in the Province of New Brunswick, according to the domicile elected by the patentee as aforesaid

or in the court of highest jurisdiction in the Province of Manitoba or of British Columbia, which courts shall adjudicate on the matter and decide as to costs. The patent and documents aforesaid shall then be held as of record in such court, so that a writ of *scire facias*, under the seal of the court, grounded upon such record, may issue for the repeal of the patent, for cause as aforesaid, if, upon proceedings had upon the writ, in accordance with the meaning of this act, the patent be adjudged to be void.

Scire facias may issue.

104

30. A certificate of the judgment voiding any patent shall, at the request of any person or party filing it to be of record in the patent office, be entered on the margin of the enrollment of the patent in the office of the commissioner; and the patent shall thereupon be and be held to have been void and of no effect, unless and until the judgment be reversed on appeal as hereinafter provided.

Judgment voiding patent to be filed in patent office.

31. The judgment declaring any patent void shall be subject to appeal to any court of appeal having appellate jurisdiction in other cases over the court by which the same was rendered.

To be subject to appeal.

Patents Issued under Former Laws.

32. All patents issued under any act of the Legislature of the late Province of Canada, or of Nova Scotia, or of New Brunswick, or of British Columbia, and all patents issued for the Provinces of Ontario and Quebec, under any act of the late Province of Canada, and all patents issued under the "patent act of 1869," to the date of the coming into operation of the present act, shall remain in force for the same term and for the same extent of territory as if the act under which they were issued had not been repealed, but subject to the provisions of this act in so far as applicable to them.

Existing provincial and Dominion patents to remain in force.

2. And it shall be lawful for the commissioner, upon the application of the patentee named in any such patent, being the inventor of the subject-matter of the patent, if the subject-matter of the patent has not been known or used, nor, with the consent of the patentee, on sale in any of the other provinces of the Dominion, to issue on payment of the proper fees in that behalf a patent under this act extending such provincial patent over the whole of the Dominion for the remainder of the term mentioned in the provincial patent.

Extension of provincial patents to other provinces on certain conditions.

Records of provincial patent offices to be handed over to the commissioner.

33. All the records of the patent offices of the late Province of Canada, and of the Provinces of Ontario and Quebec, of Nova Scotia and New Brunswick, and British Columbia, shall be handed over by the officers in charge of them to the commissioner of patents of invention, to form part of the records of the patent office for the purposes of this act.

105 *Tariff of Fees.*

Tariff of fees.

34. The following fees shall be payable to the commissioner before an application for any of the purposes hereinafter mentioned shall be entertained—that is to say:

On petition for a patent for 5 years	$20 00
On petition for a patent for 10 years	40 00
On petition for a patent for 15 years	60 00
On petition for extension from 5 to 10 years	20 00
On petition for extension from 10 to 15 years	20 00
On petition for extension from 5 to 15 years	40 00
On lodging a caveat	5 00
On asking to register a judgment *pro tanto*	4 00
On asking to register an assignment	2 00
On asking to attach a disclaimer to a patent	2 00
On asking for a copy of patent with specification	4 00
On petition to reissue a patent after surrender and on petition to extend a former patent to the Dominion for every unexpired year of the duration of such patent the fee shall be at the rate of	4 00

On office copies of documents not above mentioned the following charges shall be made:

For every single or first folio of certified copy	$0 50
For every subsequent hundred words (fractions from and under fifty being not counted and over fifty being counted for one hundred)	0 25

For copies of drawings.

35. For every copy of drawings the party applying shall pay such sum as the commissioner considers a fair remuneration for time and labor expended thereon by any officer of the department or person employed to perform such service.

Fees to be in full of all services.

36. The said fees shall be in full of all services performed under this act in any such case by the commissioner or any person employed in the patent office.

Fees to form part of con. rev. fund.

Exception.

37. All fees received under this act shall be paid over to the receiver general and form part of the consolidated revenue fund of Canada, except such sums as may be paid for copies of drawings when made by persons not receiving salaries in the patent office.

Return of fees in certain cases only.

106 **38.** No fee shall be made the subject of exemption in favour of any person, and no fee once paid shall be returned to the person who paid it, except—

1. When the invention is not susceptible of being patented.

2. When the petition for a patent is withdrawn.

And in every such case the commissioner may return one-half of the fee paid.

Case of withdrawal.

And in the case of withdrawal a fresh application shall be necessary to revive the claim, as if no proceeding had taken place in the matter.

Miscellaneous Provisions.

Intending applicant for a patent may file a caveat.

39. An intending applicant for a patent who has not yet perfected his invention and is in fear of being despoiled of his idea may file in the patent office a description of his invention so far, with or without plans, at his own will, and the commissioner, on reception of the fee hereinbefore prescribed, shall cause the said document to be preserved in secrecy, with the exception of delivering copies of the same whenever required by the said party or by any judicial tribunal, the secrecy of the document to cease when he obtains a patent for his invention, and such document shall be called a caveat: Provided always, That if application shall be made by any other person for a patent for any invention with which such caveat may in any respect interfere it shall be the duty of the commissioner forthwith to give notice by mail to the person who has filed such caveat, and such person shall, within three months after the date of mailing the notice, if he would avail himself of the caveat, file his petition and take the other steps necessary on an application for patent; and if, in the opinion of the commissioner, the applications are interfering like proceedings may be had in all respects as are by this act provided in the case of interfering applications: Provided

Effect of caveat.

Proviso, duration of caveat.

further, That unless the person filing any caveat shall, within one year from the filing thereof, have made application for a patent the commissioner of patents shall be relieved from the obligation of giving notice, the caveat then remaining as a simple matter of proof as to novelty or priority of invention if needed.

Commissioner may object to grant a patent in certain cases.

40. The commissioner may object to grant a patent in the following cases:

1. When he is of opinion that the alleged invention is not patentable in law.

107 2. When it appears to him that the invention is already in the possession of the public with the consent or allowance of the inventor.

3. When it appears to him that there is no novelty in the invention.

4. When it appears that the invention has been described in a book or other printed publication before the date of the application or is otherwise in the possession of the public.

5. When it appears that the invention has already been patented in Canada (or elsewhere, when the case is one within the seventh section of this act), except, however, when the case is one in which the commissioner has doubts as to whether the patentee or the applicant is the first inventor.

Commissioner to notify ground of objection to applicant.

41. Whenever the commissioner objects to grant a patent as aforesaid he shall notify the applicant to that effect and shall state the ground or reason therefor with sufficient detail to enable the applicant to answer, if he can, the objection of the commissioner.

Appeal by applicant to governor in council.

42. Every applicant who has failed to obtain a patent by reason of the objection of the commissioner as aforesaid may, at any time within six months after notice thereof has been addressed to him or his agent, appeal from the decision of the commissioner to the governor in council.

Arbitration in case of interfering applications.

43. In case of interfering applications for any patent the same shall be submitted to the arbitration of three skilled persons, one of whom shall be chosen by each of the applicants, and the third person shall be chosen by the commissioner or by his deputy or the person appointed to perform the duty of that office; and the decision or award of such arbitrators or any two of them, delivered to the commissioner in writing and subscribed by them or any two of them, shall be final as far as respects the granting of the patent.

The same; appointment of arbitrators.

2. If either of the applicants refuses or fails to

choose an arbitrator when required so to do by the commissioner the patent shall issue to the opposite party, and when there are more than two interfering applicants and the parties applying do not all unite in appointing three arbitrators the commissioner or his deputy or person appointed to perform the duty of that officer may appoint the three arbitrators for the purposes aforesaid.

Their oath of office.

108 3. The arbitrators so named shall, before a judge of any court in any of the provinces of Canada, subscribe to the following oath: "I, the undersigned (A B), being duly appointed an arbitrator under the authority of the forty-third section of the patent act of 1872, do hereby solemnly swear (or affirm, as the case may be) that I will well and truly perform the duty of such arbitrator on the interfering applications of (C D and E F) submitted to me."

Powers of arbitrators to summon and swear witnesses.

4. The arbitrators or any one of them, after having been so sworn, shall have the power of summoning before them any party or witness and of requiring him to give evidence on oath, orally or in writing (or on solemn affirmation if the person be entitled to affirm in civil matters), and to produce such documents and things as such arbitrators deem requisite to the full investigation of the matters into which they are appointed to examine and shall then have the same power to enforce the attendance of such witnesses and to compel them to give evidence as is vested in any court of law in civil cases in the province in which the arbitration is to be had; and any wilfully false statement made by any such witness on oath or solemn affirmation shall be deemed to be wilful and corrupt perjury, but no such party or witness shall be compelled to answer any question by his answer to which he might render himself liable to a criminal prosecution.

Wilful false evidence to be —.

As to fees to arbitrators and by whom payable.

5. The fees for the services of arbitrators shall be a matter of agreement between the said arbitrators and the parties and shall be paid by the parties naming them, respectively, except those of the arbitrator or arbitrators when named by the commissioner of patents, which shall be paid by the applicants jointly.

Documents to be open to inspection.

44. All specifications, drawings, models, disclaimers, judgments, and other papers, except caveats, shall be open to the inspection of the public at the patent office under such regulations as may be adopted in that behalf.

As to clerical errors.

45. Clerical errors happening in the framing or copying of any instrument of the patent office shall not be construed as invalidating the same, but when discovered they may be corrected under the authority of the commissioner.

Destroyed patent may be replaced.

46. In case any patent be destroyed or lost others of the like tenor, date, and effect may be issued in lieu thereof, on the party paying the fees hereinbefore prescribed for office copies of documents.

As to use of patented invention in foreign vessels.

109 **47**. No patent shall extend to prevent the use of any invention in any foreign ship or vessel, where such invention is not so used for the manufacture of any goods to be vended within or exported from Canada.

Patent not to affect a previous purchaser of the invention.

48. Every person who, before the issuing of a patent, has purchased, constructed, or acquired any invention for which a patent has been obtained under this act shall have the right of using and vending to others the specific article, machine, manufacture, or composition of matter patented so purchased, constructed, or acquired before the issue of the patent therefor without being liable to the patentee or his representatives for so doing;

Proviso, as to other persons.

but the patent shall not be held invalid as regards other persons by reason of such purchase, construction, or acquisition, or use of the invention by the person first aforesaid, or by those to whom he may have sold the same, unless the same was purchased, constructed, or acquired, or used for a longer period than one year before the application for a patent therefor, which circumstance would then have the effect of making the invention one having become public and in public use.

Patented articles to be marked as such.

49. Every patentee under this act shall stamp or engrave on each patented article sold or offered for sale by him the year of the date of patent applying to such article, thus: "Patented 1872," or as the case may be; and any such patentee selling or offering for sale any such patented article not so marked shall be liable to the punishment

Penalty for default.

of a fine not to exceed one hundred dollars, and, in default of the payment of such fine, to imprisonment not to exceed two months.

Falsely marking anything as patented to be a misdemeanor.

50. Whosoever writes, paints, prints, moulds, casts, carves, engraves, stamps, or otherwise marks upon anything made or sold by him, and for the sole making or selling of which he is not the patentee, the name or any imitation of the name of any patentee for the sole making or selling of such thing without the consent of such patentee;

or, without the consent of the patentee, writes, paints, prints, moulds, casts, carves, engraves, stamps, or otherwise marks upon anything not purchased from the patentee, the words, "patent," "letters patent," "Queen's patent," "patented," or any word or words of like import, with the intent of counterfeiting or imitating the stamp, mark, or device of the patentee or of deceiving the public and inducing them to believe that the thing in question was made or sold by or with the consent of the patentee; or whosoever puts to sale as patented any article not patented in Canada for the purpose of deceiving the public, shall be deemed guilty of a misdemeanor, and shall, on conviction, be punished therefor by fine or by imprisonment or both, in the discretion of the court before which the conviction shall be had; but the fine shall not exceed two hundred dollars, nor shall the imprisonment exceed three months.

Punishment.

51. Any person wilfully making or causing to be made any false entry in any register or book, or any false or altered copy of any document relating to the purposes of this act, or who shall produce or tender any such false or altered document, knowing the same to be such, shall be guilty of a misdemeanor, and shall be punished by fine and imprisonment accordingly.

Making false entry or copy in matters subject to this act to be a misdemeanor.

52. Chapter thirty-four of the consolidated statutes of the late Province of Canada respecting patents for inventions, chapter one hundred and seventeen of the revised statutes of Nova Scotia (third series), chapter one hundred and eighteen of the revised statutes of New Brunswick, and "the patents ordinance, 1867," of British Columbia; "the patent act of 1869," and any act amending any of the said acts or laws, or any other act relating to patents, are hereby repealed in so far as they or any of them may be inconsistent with this act or make any provision in any matter provided for by this act, except only as respects all rights acquired and penalties or liabilities incurred under the said laws or any of them before the coming into force of this act, as to which they shall remain in force; and nothing in this act contained shall affect any suit pending in any court of law or equity at the time of the coming into force of this act.

Inconsistent enactments repealed.

Exception.

53. In citing this act it shall be sufficient to call it "the patent act of 1872."

Short title.

Commencement of act.

54. This act shall commence and take effect on the first day of September, 1872.

111 [Coat of arms.]

36TH VICTORIA.

CHAP. 44.

An act to amend "the patent act of 1872." (Assented to 23rd May, 1873.)

Preamble, 35 V., c. 26.

Whereas it is expedient to amend the several sections of "the patent act of 1872," hereinafter specified, therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Section 5 amended.

1. The words "in the Canada Gazette," in the fourth line of section five of "the patent act of 1872," are hereby repealed.

Section 8 amended.

2. The word "assigns," in the last line of section eight of the said act, is hereby repealed, and the words "other legal representatives" substituted in lieu thereof.

Section 11 amended.

3. The following words are hereby inserted after the word "of," in the last line but one of section eleven of the said act: "A court of record or a public notary, or the mayor or other chief magistrate of any city, borough or town corporate in ——."

Section 14 amended.

4. The following words are hereby added and inserted at the end of section fourteen of the said act: "But the said commissioner may, in his discretion, dispense with the said duplicate specification and drawing and in lieu thereof cause copies of the specification and drawing, in print or otherwise, to be attached to the patent of which they shall form an essential part."

Section 16 amended.

5. The said act shall be amended by inserting the words "legal representatives" after the word "administrators," in the sixteenth section thereof.

To form one act with amended act.

6. This act shall be read and interpreted as forming one and the same act with the act hereby amended.

112 [Coat of arms.]

37TH VICTORIA.

CHAP. 44.

An act further to amend "the patent act of 1872."
(Assented to 26th May, 1874.)

Preamble. Whereas the supreme court in the Province of New Brunswick was by error named the court of Queen's bench in the Province of New Brunswick in the twenty-ninth section of "the patent act of 1872," and it is expedient that the error should be corrected, therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, declares and enacts as follows:

Section 29 of 39 V., c. 26, amended. **1.** The court in New Brunswick intended to have been named in the said section of the said act was and is the supreme court in that province, and the words "supreme court in the Province of New Brunswick" shall be substituted for the words "court of Queen's bench in the Province of New Brunswick" in the reading and construing of the said section of the said act, which shall be read and construed throughout as if the words hereby substituted had at the time of the passing of the said act formed part of the same, in the place of the words for which they are hereby substituted, and the said section of the said act and everything contained therein shall take and have effect accordingly.

113 [Coat of arms.]

38TH VICTORIA.

CHAP. 14.

An act still further to amend "the patent act of 1872," and to extend the same, as amended, to Prince Edward Island. (Assented to 8th April, 1875.)

Preamble. Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Addition to s. 19 of 35 V., c. 26. **1.** The following words are hereby added to section nineteen of "the patent act of 1872," after the word "patent," in the last line thereof—that is to say, "and the commissioner may entertain separate applications and cause patents to be issued for distinct and separate parts of the thing

patented upon payment of the fee for a reissue for each of such reissued patents."

New subsect. substituted for subsect. of s. 28 of 35 V., c. 26.

2. The subsection of section twenty-eight of "the patent act of 1872" is hereby repealed, and the following subsection is hereby substituted therefor, and shall be read as the subsection of the twenty-eighth section of the said act:

Commissioner may extend the term for manufacture in Canada, and when.

2. Whenever a patentee has been unable to carry on the construction or manufacture of his invention within the two years hereinbefore mentioned the commissioner may, at any time not more than three months before the expiration of that period, grant to the patentee a further delay on his adducing proof to the satisfaction of the commissioner that he was, for reasons beyond his control, prevented from complying with the above-mentioned condition."

S. 49 of 35 V., c. 26, repealed and new sect. substituted.

3. The forty-ninth section of "the patent act of 1872" is hereby repealed, and the following section is hereby substituted therefor, and shall be read as the forty-ninth section of the said act:

Patented articles and packages containing patented articles to be marked as such.

114 **"49**. Every patentee under this act shall stamp or engrave on each patented article sold or offered for sale by him the year of the date of patent applying to such article, thus: 'Patented 1872,' or as the case may be; or, when from the nature of the article this cannot be done, by fixing to it or to every package wherein one or more of such articles is or are enclosed a label marked with a like notice; and any such patentee selling or offering for sale any such patented article not so marked or not enclosed in a package so marked shall be liable to the punishment of a fine not to exceed one hundred dollars, and in default of the payment of such fine to imprisonment not to exceed two months."

Penalty for default.

Provisions of 35 V., c. 26, and its amending acts and patents issued under them extended to Prince Edward Island.

4. From and after the passing of this act all and every the provisions of "the patent act of 1872," as amended by this act, and of the acts amending the same, shall have the same force and effect in Prince Edward Island as the same then respectively have in the other provinces forming this Dominion; and every patent theretofore issued under the said acts or any of them shall extend over the said province for the remainder of the term mentioned therein.

Inconsistent enactments of acts of General Assembly of Prince Edward Island repealed. 7 W. 4, c. 21, 32 V., c. 20, and 33 V., c. 19.

5. The following acts of the General Assembly of Prince Edward Island are hereby repealed—that is to say, the act passed in the seventh year of the reign of His late Majesty King William IV,

chapter twenty-one, intituled "An act for granting patents for useful inventions;" the act passed in the thirty-second year of Her Majesty's reign, chapter twenty, intituled "An act to add to and amend the act relating to patents for useful inventions," and the act passed in the thirty-third year of Her Majesty's reign, chapter nineteen, intituled "An act to amend the act relating to patents for useful inventions," but in so far only as such acts or any of them may be inconsistent with this act or make any provision in any matter provided for by this act, except only as respects all rights acquired and penalties or liabilities incurred under the said acts or any of them before the coming into force of this act, as to which the said acts shall remain in force; and nothing in this act contained shall affect any suit pending in any court of law or equity at the time of the coming into force of this act.

Patents Issued under Former Laws.

Existing provincial patents to remain in force.

6. All patents issued under the said acts of the General Assembly of Prince Edward Island or any of them to the date of the passing of this act shall remain in force in the said province for the same term as if the act or acts under which such patents, respectively, were issued had not been repealed, but subject to all the provisions of this act, in so far as such provisions or any of them may be applicable to such patents, respectively.

Extension of provincial patents provided for.

2. And it shall be lawful for the commissioner, upon the application of the patentee named in any such patent, being the inventor of the subject-matter of the patent, if the subject-matter of the patent has not been known or used nor, with the consent of the patentee, on sale in any of the other provinces of the Dominion, to issue, on payment of the proper fees in that behalf, a patent under this act extending such provincial patent over the whole of the Dominion for the remainder of the term mentioned in the provincial patent.

Records of patent office of Prince Edward Island to be handed over to commissioner.

7. All the records of the patent office of the Province of Prince Edward Island shall be handed over by the officers in charge of them to the commissioner of patents of invention to form part of the records of the patent office for the purposes of the act hereby amended and of the acts amending the same and of this act.

Proceedings for impeachment of patents.

8. Any person desiring to impeach any patent issued under "the patent act of 1872," as amended by subsequent acts and by this act, the petitioner for which has elected his domicile at any place in Prince Edward Island, may obtain a sealed and certified copy of the patent and of the petition, affidavit, specification, and drawings thereunto relating, and may have the same filed in the office of the clerk of the supreme court of judicature in that province, which court shall adjudicate on the matter and decide as to costs. The patent and documents aforesaid shall then be held as of record in such court, so that a writ of *scire facias* under the seal of the court grounded upon such record may issue for the repeal of the patent for cause as aforesaid, if upon proceedings had upon the writ in accordance with the meaning of this act the patent be adjudged to be void.

Act to be one with former acts.

9. This act shall be read and construed as one act with the act hereby amended and the two acts amending the same, and the said four acts may be cited together as "The patent acts, 1872 to 1875."

Short title.

116 [Coat of arms.]

45 VICTORIA.

CHAP. 22.

An act to further amend "the patent act of 1872."
(Assented to 17th May, 1882.)

Preamble.

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Sect. 28 of patent act amended.

1. Section twenty-eight of "patent acts of 1872" is hereby amended by the addition of the following subsection:

Further provision as to extension of patent.

"3. The commissioner may grant to the patentee or his assignee or assignees for the whole or any part of the patent an extension for a further period of time, not exceeding one year beyond the twelve months limited by the first paragraph of this section, during which he may import or cause to be imported into Canada the invention for which the patent is granted: Provided, That the patentee or his assignee or assignees for the whole or any part of the patent shall show cause satisfactory to the commissioner to warrant the granting of such extension; but no extension shall be granted, unless application be made to

Proviso: cause must be shewn.

Time for application limited.

the commissioner at some time within three months before the expiry of the twelve months aforesaid or any extension thereof."

117 [Coat of arms.]

46 VICTORIA.

CHAP. 19.

An act to amend "the patent act of 1872." (Assented to 25th May, 1883.)

Preamble.

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

S. 17 of 35 V., c. 26, repealed and new — substituted.

1. Section seventeen of "the patent act of 1872" is hereby repealed, and the following is substituted therefor:

Patents to be for fifteen years.

"**17.** The term limited for the duration of every patent of invention issued by the patent office shall be fifteen years; but at the time of the application therefor it shall be at the option of the applicant to pay the full fee required for the term of fifteen years, or the partial fee required for the term of five years, or the partial fee required for the term of ten years. In case a partial fee only is paid the proportion of the fee paid shall be stated in the patent, and the patent shall, notwithstanding anything therein or in this act contained, cease at the end of the term for which the partial fee has been paid, unless at or before the expiration of the said term the holder of the patent pays the fee required for the further term of five or ten years, and takes out from the patent office a certificate of such payment (in the form which may be from time to time adopted), to be attached to and to refer to the patent, and under the signature of the commissioner, or, in case of his absence, another member of the privy council; and in case such second payment, together with the first payment, makes up only the fee required for ten years, then the patent shall, notwithstanding anything therein or in this act contained, cease at the end of the term of

118 ten years, unless at or before the expiration of such term the holder thereof pays the further fee required for the remaining five years, making up the full term of fifteen years, and takes out a like certificate in respect thereof. Every patent heretofore issued by the patent office in respect of which the fee required for the

But partial fees may be paid, and in such case the patent to lapse at the end of 5 or 10 years.

Unless remainder of the fee is paid.

Patents hitherto issued deemed to be for 15 years, subject to provisions of this act.

advice and consent of the lords spiritual and temporal and commons in this present Parliament assembled and by the authority of the same, as follows:

I.—Preliminary.

Short title.

1. This act may be cited as The British North America act, 1867.

Application of provisions referring to the Queen.

123 **2.** The provisions of this act referring to Her Majesty the Queen extend also to the heirs and successors of Her Majesty, Kings and Queens of the United Kingdom of Great Britain and Ireland.

II.—Union.

Declaration of union.

3. It shall be lawful for the Queen, by and with the advice of Her Majesty's most honorable privy council, to declare by proclamation that on and after a day therein appointed, not being more than six months after the passing of this act, the Provinces of Canada, Nova Scotia, and New Brunswick shall form and be one dominion under the name of Canada; and on and after that day those three provinces shall form and be one dominion under that name accordingly.

Construction of subsequent provisions of act.

4. The subsequent provisions of this act shall, unless it is otherwise expressed or implied, commence and have effect on and after the union—that is to say, on and after the day appointed for the union taking effect in the Queen's proclamation—and in the same provisions, unless it is otherwise expressed or implied, the name Canada shall be taken to mean Canada as constituted under this act.

Four provinces.

5. Canada shall be divided into four provinces, named Ontario, Quebec, Nova Scotia, and New Brunswick.

Provinces of Ontario and Quebec.

6. The parts of the Province of Canada (as it exists at the passing of this act) which formerly constituted, respectively, the Provinces of Upper Canada and Lower Canada shall be deemed to be severed and shall form two separate provinces. The part which formerly constituted the Province of Upper Canada shall constitute the Province of Ontario and the part which formerly constituted the Province of Lower Canada shall constitute the Province of Quebec.

Provinces of Nova Scotia and New Brunswick.

7. The Provinces of Nova Scotia and New Brunswick shall have the same limits as at the passing of this act.

Decennial census.

8. In the general census of the population of Canada, which is hereby required to be taken in the year one thousand eight hundred and seventy-one and in every tenth year thereafter, the respective populations of the four provinces shall be distinguished.

III.—Executive Power.

Declaration of executive power in the Queen.

9. The executive government and authority of and over Canada is hereby declared to continue and be vested in the Queen.

Application of provisions referring to governor general.

124 **10.** The provisions of this act referring to the governor general extend and apply to the governor general for the time being of Canada or other the chief executive officer or administrator for the time being carrying on the government of Canada on behalf and in the name of the Queen, by whatever title he is designated.

Constitution of privy council for Canada.

11. There shall be a council to aid and advise in the government of Canada, to be styled the Queen's privy council for Canada, and the persons who are to be members of that council shall be from time to time chosen and summoned by the governor general and sworn in as privy councillors, and members thereof may be from time to time removed by the governor general.

All powers under acts to be exercised by governor general with advice of privy council or alone.

12. All powers, authorities, and functions which under any act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, Nova Scotia, or New Brunswick are at the union vested in or exerciseable by the respective governors or lieutenant governors of those provinces, with the advice or with the advice and consent of the respective executive councils thereof, or in conjunction with those councils or with any number of members thereof, or by those governors or lieutenant governors individually, shall, as far as the same continue in existence and capable of being exercised after the union in relation to the government of Canada, be vested in and exerciseable by the governor general, with the advice or with the advice and consent of or in conjunction with the Queen's privy council for Canada or any members thereof, or by the governor general individually, as the case requires, subject, nevertheless (except with respect to such as exist under acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great

Britain and Ireland), to be abolished or altered by the Parliament of Canada.

Application of provisions referring to governor general in council.

13. The provisions of this act referring to the governor general in council shall be construed as referring to the governor general acting by and with the advice of the Queen's privy council for Canada.

Power to Her Majesty to authorize governor general to appoint deputies.

14. It shall be lawful for the Queen, if Her Majesty thinks fit, to authorize the governor general from time to time to appoint any person or any persons jointly or severally to be his deputy or deputies within any part or parts of Canada, and in that capacity to exercise during the pleasure of the governor general such of the powers, authorities, and functions of the governor general as the governor general deems it necessary or expedient to assign to him or them, subject to any limitations or directions expressed or given by the Queen; but the appointment of such a deputy or deputies shall not affect the exercise by the governor general himself of any power, authority, or function.

Command of armed forces to continue to be vested in the Queen.

15. The command-in-chief of the land and naval militia and of all naval and military forces of and in Canada is hereby declared to continue and be vested in the Queen.

Seat of government of Canada.

16. Until the Queen otherwise directs, the seat of government of Canada shall be Ottawa.

IV.—Legislative Power.

Constitution of Parliament of Canada.

17. There shall be one Parliament for Canada, consisting of the Queen, and upper house styled the senate, and the house of commons.

Privileges, &c., of houses.

18. The privileges, immunities, and powers to be held, enjoyed, and exercised by the senate and by the house of commons and by the members thereof, respectively, shall be such as are from time to time defined by act of the Parliament of Canada, but so that the same shall never exceed those at the passing of this act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland and by the members thereof.

First session of the Parliament of Canada.

19. The Parliament of Canada shall be called together not later than six months after the union.

Yearly session of the Parliament of Canada.

20. There shall be a session of the Parliament of Canada once at least in every year, so that twelve months shall not intervene between the last sitting of the Parliament in one session and its first sitting in the next session.

The Senate.

Number of senators.

21. The senate shall, subject to the provisions of this act, consist of seventy-two members, who shall be styled senators.

Representation of provinces in senate.

22. In relation to the constitution of the senate, Canada shall be deemed to consist of three divisions—

1. Ontario;
2. Quebec;
3. The maritime provinces, Nova Scotia and New Brunswick;

126 which three divisions shall (subject to the provisions of this act) be equally represented in the senate as follows: Ontario by twenty-four senators, Quebec by twenty-four senators, and the maritime provinces by twenty-four senators, twelve thereof representing Nova Scotia and twelve thereof representing New Brunswick.

In the case of Quebec, each of the twenty-four senators representing that province shall be appointed for one of the twenty-four electoral divisions of Lower Canada specified in Schedule A to chapter one of the consolidated statutes of Canada.

Qualification of senators.

23. The qualification of a senator shall be as follows:

(1.) He shall be of the full age of thirty years.

(2.) He shall be either a natural-born subject of the Queen or a subject of the Queen naturalized by an act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of one of the Provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick before the union, or of the Parliament of Canada after the union.

(3.) He shall be legally or equitably seized as of freehold, for his own use and benefit, of lands or tenements held in free and common socage, or seized or possessed for his own use and benefit of lands or tenements held in franc-alleu or in roture, within the province for which he is appointed, of the value of four thousand dollars over and above all rents, dues, debts, charges, mortgages, and incumbrances due or payable out of or charged on or affecting the same.

(4.) His real and personal property shall be together worth four thousand dollars over and above his debts and liabilities.

(5.) He shall be a resident in the province for which he is appointed.

(6.) In case of Quebec, he shall have his real property qualification in the electoral division for which he is appointed, or shall be resident in that division.

Summons of senators.

24. The governor general shall, from time to time, in the Queen's name, by instrument under the great seal of Canada, summon qualified persons to the senate; and, subject to the provisions of this act, every person so summoned shall become and be a member of the senate and a senator.

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Summons of first body of senators.

25. Such persons shall be first summoned to the senate as the Queen by warrant under Her Majesty's royal sign manual thinks fit to approve, and their names shall be inserted in the Queen's proclamation of union.

Addition of senators in certain cases.

26. If at any time, on the recommendation of the governor general, the Queen thinks fit to direct that three or six members be added to the senate, the governor general may by summons to three or six qualified persons (as the case may be) representing equally the three divisions of Canada, add to the senate accordingly.

Reduction of senate to normal number.

27. In case of such addition being at any time made, the governor general shall not summon any person to the senate except on a further like direction by the Queen on the like recommendation, until each of the three divisions of Canada is represented by twenty-four senators and no more.

Maximum number of senators.

28. The number of senators shall not at any time exceed seventy-eight.

Tenure of place in senate.

29. A senator shall, subject to the provisions of this act, hold his place in the senate for life.

Resignation of place in senate.

30. A senator may, by writing under his hand, addressed to the governor general, resign his place in the senate, and thereupon the same shall be vacant.

Disqualification of senators.

31. The place of a senator shall become vacant in any of the following cases:

(1.) If for two consecutive sessions of the Parliament he fails to give his attendance in the senate.

(2.) If he takes an oath or makes a declaration or acknowledgment of allegiance, obedience, or adherence to a foreign power, or does an act whereby he becomes a subject or citizen or entitled to the rights or privileges of a subject or citizen of a foreign power.

(3.) If he is adjudged bankrupt or insolvent, or applies for the benefit of any law relating to insolvent debtors, or becomes a public defaulter.

(4.) If he is attainted of treason or convicted of felony or of any infamous crime.

128 (5.) If he ceases to be qualified in respect of property or of residence: Provided, That a senator shall not be deemed to have ceased to be qualified in respect of residence by reason only of his residing at the seat of the government of Canada while holding an office under that government requiring his presence there.

Summons on vacancy in senate.

32. When a vacancy happens in the senate by resignation, death, or otherwise, the governor general shall, by summons to a fit and qualified person, fill the vacancy.

Questions as to qualifications and vacancies in senate.

33. If any question arises respecting the qualification of a senator or a vacancy in the senate the same shall be heard and determined by the senate.

Appointment of speaker of senate.

34. The governor general may from time to time, by instrument under the great seal of Canada, appoint a senator to be speaker of the senate, and may remove him and appoint another in his stead.

Quorum of senate.

35. Until the Parliament of Canada otherwise provides, the presence of at least fifteen senators, including the speaker, shall be necessary to constitute a meeting of the senate for the exercise of its powers.

Voting in senate.

36. Questions arising in the senate shall be decided by a majority of voices, and the speaker shall in all cases have a vote, and when the voices are equal the decision shall be deemed to be in the negative.

The House of Commons.

Constitution of House of Commons in Canada.

37. The House of Commons shall, subject to the provisions of this act, consist of one hundred and eighty-one members, of whom eighty-two shall be elected for Ontario, sixty-five for Quebec, nineteen for Nova Scotia, and fifteen for New Brunswick.

Summoning of House of Commons.

38. The governor general shall from time to time, in the Queen's name, by instrument under the great seal of Canada, summon and call together the House of Commons.

Senators not to sit in House of Commons.

39. A senator shall not be capable of being elected or of sitting or voting as a member of the House of Commons.

Electoral districts of the four provinces.

40. Until the Parliament of Canada otherwise provides, Ontario, Quebec, Nova Scotia, and New Brunswick shall, for the purposes of the election of members to serve in the House of Commons, be divided into electoral districts as follows:

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1. Ontario.

Ontario shall be divided into the counties, ridings of counties, cities, parts of cities, and towns enumerated in the first schedule of this act, each whereof shall be an electoral district, each such district as numbered in that schedule being entitled to return one member.

2. Quebec.

Quebec shall be divided into sixty-five electoral districts, composed of the sixty-five electoral divisions into which Lower Canada is at the passing of this act divided, under chapter two of the Consolidated Statutes of Canada, chapter seventy-five of the Consolidated Statutes for Lower Canada, and the act of the Province of Canada of the twenty-third year of the Queen, chapter one, or any other act amending the same in force at the union, so that each such electoral division shall be, for the purposes of this act, an electoral district entitled to return one member.

3. Nova Scotia.

Each of the eighteen counties of Nova Scotia shall be an electoral district. The county of Halifax shall be entitled to return two members and each of the other counties one member.

4. New Brunswick.

Each of the fourteen counties into which New Brunswick is divided, including the city and county of St. John, shall be an electoral district. The city of St. John shall also be a separate electoral district. Each of those fifteen electoral districts shall be entitled to return one member.

Continuance of existing election laws until Parliament of Canada otherwise provides.

41. Until the Parliament of Canada otherwise provides, all laws in force in the several provinces at the union, relative to the following matters or any of them, namely, the qualifications and disqualifications of persons to be elected or to sit or vote as members of the House of Assembly or Legislative Assembly in the several provinces, the voters at elections of such members, the oaths to be taken by voters, the returning officers, their powers and duties, the proceedings at elections, the periods during which elections may be continued, the trials of controverted elections and proceedings incident thereto, the vacating of seats of members, and the execution of new writs in case of seats

vacated otherwise than by dissolution, shall respectively apply to elections of members to serve in the House of Commons for the same several provinces.

130 Provided, That, until the Parliament of Canada otherwise provides, at any election for a member of the House of Commons for the district of Algoma, in addition to persons qualified by the law of the Province of Canada to vote, every male British subject aged twenty-one years or upwards, being a householder, shall have a vote.

Writs for first election.

42. For the first election of members to serve in the House of Commons the governor general shall cause writs to be issued by such person in such form and addressed to such returning officers as he thinks fit.

The person issuing writs under this section shall have the like powers as are possessed at the union by the officers charged with the issuing of writs for the election of members to serve in the respective House of Assembly or Legislative Assembly of the Province of Canada, Nova Scotia, or New Brunswick; and the returning officers to whom writs are directed under this section shall have the like powers as are possessed at the union by the officers charged with the returning of writs for the election of members to serve in the same respective House of Assembly or Legislative Assembly.

As to casual vacancies.

43. In case a vacancy in the representation in the House of Commons of any electoral district happens before the meeting of the Parliament, or after the meeting of the Parliament before provision is made by the Parliament in this behalf, the provisions of the last foregoing section of this act shall extend and apply to the issuing and returning of a writ in respect of such vacant district.

As to election of speaker of House of Commons.

44. The House of Commons on its first assembling after a general election shall proceed with all practical speed to elect one of its members to be speaker.

As to filling up vacancy in office of speaker.

45. In case of a vacancy happening in the office of speaker by death, resignation, or otherwise, the House of Commons shall with all practicable speed proceed to elect another of its members to be speaker.

Speaker to preside.

46. The speaker shall preside at all meetings of the House of Commons.

Provisions in case of absence of speaker.

47. Until the Parliament of Canada otherwise provides, in case of the absence for any reason of the speaker from the chair of the House of Commons for a period of forty-eight consecutive hours, the house may elect another of its members to act as speaker, and the member so elected shall, during the continuance of such absence of the speaker, have and execute all the powers, privileges, and duties of speaker.

Quorum of House of Commons.

131 **48**. The presence of at least twenty members of the House of Commons shall be necessary to constitute a meeting of the house for the exercise of its powers, and for that purpose the speaker shall be reckoned as a member.

Voting in House of Commons.

49. Questions arising in the House of Commons shall be decided by a majority of voices other than that of the speaker, and when the voices are equal, but not otherwise, the speaker shall have a vote.

Duration of House of Commons.

50. Every House of Commons shall continue for five years from the day of the return of the writs for choosing the house (subject to be sooner dissolved by the governor general) and no longer.

Decennial readjustment of representation.

51. On the completion of the census in the year one thousand eight hundred and seventy-one and of each subsequent decennial census, the representation of the four provinces shall be readjusted by such authority, in such manner, and from such time as the Parliament of Canada from time to time provides, subject and according to the following rules:

(1.) Quebec shall have the fixed number of sixty-five members.

(2.) There shall be assigned to each of the other provinces such a number of members as will bear the same proportion to the number of its population (ascertained at such census) as the number sixty-five bears to the number of the population of Quebec (so ascertained).

(3.) In the computation of the number of members for a province a fractional part not exceeding one-half of the whole number requisite for entitling the province to a member shall be disregarded, but a fractional part exceeding one-half of that number shall be equivalent to the whole number.

(4.) On any such readjustment the number of members for a province shall not be reduced unless the proportion which the number of the population of a province bore to the number of the aggregate population of Canada at the then last

preceding readjustment of the number of members for the province is ascertained at the then latest census to be diminished by one-twentieth part or upwards.

(5.) Such readjustment shall not take effect until the termination of the then existing Parliament.

Increase of number of House of Commons.

132 **52.** The number of members of the House of Commons may be from time to time increased by the Parliament of Canada, provided the proportionate representation of the provinces prescribed by this act is not disturbed

Money Votes; Royal Assent.

Appropriation and tax bills.

53. Bills for appropriating any part of the public revenue or for imposing any tax or impost shall originate in the House of Commons.

Recommendation of money votes.

54. It shall not be lawful for the House of Commons to adopt or pass any vote, resolution, address, or bill for the appropriation of any part of the public revenue or of any tax or impost to any purpose that has not been first recommended to that house by message of the governor general in the session in which such vote, resolution, address, or bill is proposed.

Royal assent to bills, &c.

55. Where a bill passed by the houses of the Parliament is presented to the governor general for the Queen's assent he shall declare, according to his discretion, but subject to the provisions of this act and to Her Majesty's instructions, either that he assents thereto in the Queen's name, or that he withholds the Queen's assent, or that he reserves the bill for the signification of the Queen's pleasure.

Disallowance by order in council of act assented to by governor general.

56. Where the governor general assents to a bill in the Queen's name he shall, by the first convenient opportunity, send an authentic copy of the act to one of Her Majesty's principal secretaries of state, and if the Queen in council within two years after receipt thereof by the secretary of state thinks fit to disallow the act such disallowance (with a certificate of the secretary of state of the day on which the act was received by him), being signified by the governor general, by speech or message to each of the houses of the Parliament or by proclamation, shall annul the act from and after the day of such signification.

Signification of Queen's pleasure on bill reserved.

57. A bill reserved for the signification of the Queen's pleasure shall not have any force unless and until within two years from the day on which it was presented to the governor general for the

Queen's assent the governor general signifies, by speech or message to each of the houses of the Parliament or by proclamation, that it has received the assent of the Queen in council.

An entry of every such speech, message, or proclamation shall be made in the journal of each house, and a duplicate thereof, duly attested, shall be delivered to the proper officer, to be kept among the records of Canada.

Executive Power.

Appointment of lieutenant governors of provinces.

58. For each province there shall be an officer, styled the lieutenant governor, appointed by the governor general in council by instrument under the great seal of Canada.

Tenure of office of lieutenant governor.

59. A lieutenant governor shall hold office during the pleasure of the governor general; but any lieutenant governor appointed after the commencement of the first session of the Parliament of Canada shall not be removable within five years from his appointment, except for cause assigned, which shall be communicated to him in writing within one month after the order for his removal is made, and shall be communicated by message to the Senate and to the House of Commons within one week thereafter if the Parliament is then sitting, and if not, then within one week after the commencement of the next session of the Parliament.

Salaries of lieutenant governors.

60. The salaries of the lieutenant governors shall be fixed and provided by the Parliament of Canada.

Oaths, &c., of lieutenant governor.

61. Every lieutenant governor shall, before assuming the duties of his office, make and subscribe before the governor general or some person authorized by him oaths of allegiance and office similar to those taken by the governor general.

Application of provisions referring to lieutenant governor.

62. The provisions of this act referring to the lieutenant governor extend and apply to the lieutenant governor for the time being of each province or other the chief executive office or administrator for the time being carrying on the government of the province, by whatever title he is designated.

Appointment of executive officers for Ontario and Quebec.

63. The executive council of Ontario and of Quebec shall be composed of such persons as the lieutenant governor from time to time thinks fit, and in the first instance of the following officers, namely: The attorney general, the secretary and registrar of the province, the treasurer of the prov-

ince, the commissioner of crown lands and the commissioner of agriculture and public works within Quebec, the speaker of the legislative council, and the solicitor general.

Executive government of Nova Scotia and New Brunswick.

64. The constitution of the executive authority in each of the Provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this act, continue as it exists at the union until altered under the authority of this act.

Powers to be exercised by lieutenant governor of Ontario or Quebec with advice or alone.

65. All powers, authorities, and functions which under any act of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland or of the Legislature of Upper Canada, Lower Canada, or Canada were or are before or at the union vested in or exercisable by the respective governors or lieutenant governors of those Provinces, with the advice or with the advice and consent of the respective executive councils thereof or in conjunction with those councils or with any number of members thereof or by those governors or lieutenant governors individually, shall, as far as the same are capable of being exercised after the union in relation to the government of Ontario and Quebec, respectively, be vested in and shall or may be exercised by the lieutenant governor of Ontario and Quebec, respectively, with the advice or with the advice and consent of or in conjunction with the respective executive councils or any members thereof or by the lieutenant governor individually, as the case requires, subject, nevertheless (except with respect to such as exist under acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland), to be abolished or altered by the respective Legislatures of Ontario and Quebec.

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Application of provisions referring to lieutenant governor in council.

66. The provisions of this act referring to the lieutenant governor in council shall be construed as referring to the lieutenant governor of the province acting by and with the advice of the executive council thereof.

Administration in absence, &c., of lieutenant governor.

67. The governor general in council may, from time to time, appoint an administrator to execute the office and functions of lieutenant governor during his absence, illness, or other inability.

Seats of provincial governments.

68. Unless and until the executive government of any province otherwise directs with respect to that province the seats of government of the provinces shall be as follows, namely: Of Ontario, the city of Toronto; of Quebec, the city of Que-

bec; of Nova Scotia, the city of Halifax, and of New Brunswick, the city of Fredericton.

Legislative Power.

1. Ontario.

Legislature for Ontario.

69. There shall be a legislature for Ontario, consisting of the lieutenant governor and of one house, styled the Legislative Assembly of Ontario.

Electoral districts.

70. The Legislative Assembly of Ontario shall be composed of eighty-two members, to be elected to represent the eighty-two electoral districts set forth in the first schedule to this act.

2. Quebec.

Legislature for Quebec.

71. There shall be a legislature for Quebec, consisting of the lieutenant governor and of two houses, styled the Legislative Council of Quebec and the Legislative Assembly of Quebec.

Constitution of legislative council.

72. The legislative council of Quebec shall be composed of twenty-four members, to be appointed by the lieutenant governor in the Queen's name by instrument under the great seal of Quebec, one being appointed to represent each of the twenty-four electoral divisions of Lower Canada in this act referred to, and each holding office for the term of his life, unless the Legislature of Quebec otherwise provides under the provisions of this act.

Qualification of legislative councillors.

73. The qualifications of the legislative councillors of Quebec shall be the same as those of the senators for Quebec.

Resignation, disqualification, &c.

74. The place of a legislative councillor of Quebec shall become vacant in the cases *mutatis mutandis*, in which the place of senator becomes vacant.

Vacancies.

75. When a vacancy happens in the legislative council of Quebec, by resignation, death, or otherwise, the lieutenant governor in the Queen's name, by instrument under the great seal of Quebec, shall appoint a fit and qualified person to fill the vacancy.

Questions as to vacancies, &c.

76. If any question arises respecting the qualification of a legislative councillor of Quebec or a vacancy in the legislative council of Quebec the same shall be heard and determined by the legislative council.

Speaker of legislative council.

77. The lieutenant governor may, from time to time, by instrument under the great seal of

Quebec, appoint a member of the legislative council of Quebec to be speaker thereof and may remove him and appoint another in his stead.

Quorum of legislative council.

78. Until the Legislature of Quebec otherwise provides the presence of at least ten members of the legislative council, including the speaker, shall be necessary to constitute a meeting for the exercise of its powers.

Voting in legislative council.

79. Questions arising in the legislative council of Quebec shall be decided by a majority
136 of voices, and the speaker shall in all cases have a vote, and when the voices are equal the decision shall be deemed to be in the negative.

Constitution of Legislative Assembly of Quebec.

80. The Legislative Assembly of Quebec shall be composed of sixty-five members, to be elected to represent the sixty-five electoral divisions or districts of Lower Canada in this act referred to, subject to alteration thereof by the Legislature of Quebec: Provided, That it shall not be lawful to present to the lieutenant governor of Quebec for assent any bill for altering the limits of any of the electoral divisions or districts mentioned in the second schedule to this act, unless the second and third readings of such bill have been passed in the Legislative Assembly with the concurrence of the majority of the members representing all those electoral divisions or districts, and the assent shall not be given to such bill unless an address has been presented by the Legislative Assembly to the lieutenant governor stating that it has been so passed.

3. Ontario and Quebec.

First session of Legislatures.

81. The Legislatures of Ontario and Quebec, respectively, shall be called together not later than six months after the union.

Summoning of Legislative Assemblies.

82. The lieutenant governor of Ontario and of Quebec shall from time to time, in the Queen's name, by instrument under the great seal of the province, summon and call together the Legislative Assembly of the province.

Restriction on election of holders of office.

83. Until the Legislature of Ontario or of Quebec otherwise provides, a person accepting or holding in Ontario or in Quebec any office, commission, or employment, permanent or temporary, at the nomination of the lieutenant governor, to which an annual salary or any fee, allowance, emolument, or profit of any kind or amount whatever from the province is attached, shall not be eligible as a member of the Legislative Assembly

of the respective province, nor shall he sit or vote as such; but nothing in this section shall make ineligible any person being a member of the executive council of the respective province or holding any of the following offices—that is to say, the offices of attorney general, secretary and registrar of the province, treasurer of the province, commissioner of crown lands, and commissioner of agriculture and public works, and in Quebec solicitor general, or shall disqualify him to sit or vote in the house for which he is elected, provided he is elected while holding such office.

Continuance — existing election laws.

84. Until the Legislatures of Ontario and Quebec, respectively, otherwise provide, all laws 137 which at the union are in force in those provinces, respectively, relative to the following matters or any of them, namely, the qualifications and disqualifications of persons to be elected or to sit or vote as members of the Assembly of Canada, the qualifications or disqualifications of voters, the oaths to be taken by voters, the returning officers—their powers and duties—the proceedings at elections, the periods during which such elections may be continued, and the trial of controverted elections and the proceedings incident thereto, the vacating of the seats of members, and the issuing and execution of new writs in case of seats vacated otherwise than by dissolution, shall, respectively, apply to elections of members to serve in the respective Legislative Assemblies of Ontario and Quebec:

Provided, That until the Legislature of Ontario otherwise provides at any election for a member of the Legislative Assembly of Ontario for the district of Algoma, in addition to persons qualified by the law of the Province of Canada to vote every male British subject, aged twenty-one years or upwards, being a householder, shall have a vote.

Duration of Legislative Assemblies.

85. Every Legislative Assembly of Ontario and every Legislative Assembly of Quebec shall continue for four years from the day of the return of the writs for choosing the same (subject, nevertheless, to either the Legislative Assembly of Ontario or the Legislative Assembly of Quebec being sooner dissolved by the lieutenant governor of the province) and no longer.

Yearly session of Legislature.

86. There shall be a session of the Legislature of Ontario and of that of Quebec once at least in every year, so that twelve months shall not intervene between the last sitting of the Legislature in

each province in one session and its first sitting in the next session.

Speaker, quorum, &c.

87. The following provisions of this act respecting the House of Commons of Canada shall extend and apply to the Legislative Assemblies of Ontario and Quebec—that is to say, the provisions relating to the election of a speaker originally and on vacancies, the duties of the speaker, the absence of the speaker, the quorum, and the mode of voting—as if those provisions were here re-enacted and made applicable in terms to each such Legislative Assembly.

4. Nova Scotia and New Brunswick.

Constitutions of Legislatures of Nova Scotia and New Brunswick.

88. The constitution of the Legislature of each of the Provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this
138 act, continue as it exists at the union until altered under the authority of this act, and the House of Assembly of New Brunswick existing at the passing of this act shall, unless sooner dissolved, continue for the period for which it was elected.

5. Ontario, Quebec, and Nova Scotia.

First elections.

89. Each of the lieutenant governors of Ontario, Quebec, and Nova Scotia shall cause writs to be issued for the first election of members of the Legislative Assembly thereof in such form and by such person as he thinks fit, and at such time and addressed to such returning officer as the governor general directs, and so that the first election of member of Assembly for any electoral district or any subdivision thereof shall be held at the same time and at the same places as the election for a member to serve in the House of Commons of Canada for that electoral district.

6. The four Provinces.

Application to Legislatures of provisions respecting money votes, &c.

90. The following provisions of this act respecting the Parliament of Canada—namely, the provisions relating to appropriation and tax bills, the recommendation of money votes, the assent to bills, the disallowance of acts, and the signification of pleasure on bills reserved—shall extend and apply to the legislatures of the several provinces as if those provisions were here re-enacted and made applicable in terms to the respective provinces and the legislatures thereof, with the substitution of the lieutenant governor of the

province for the governor general, of the governor general for the Queen and for a secretary of state, of one year for two years, and of the province for Canada.

VI.—Distribution of Legislative Powers.

Powers of the Parliament.

Legislative authority of Parliament of Canada.

91. It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by this act assigned exclusively to the legislatures of the provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated—that is to say:

139 1. The public debt and property.

2. The regulation of trade and commerce.

3. The raising of money by any mode or system of taxation.

4. The borrowing of money on the public credit.

5. Postal service.

6. The census and statistics.

7. Militia, military and naval service, and defence.

8. The fixing of and providing for the salaries and allowances of civil and other officers of the government of Canada.

9. Beacons, buoys, light-houses, and Sable Island.

10. Navigation and shipping.

11. Quarantine and the establishment and maintenance of marine hospitals.

12. Sea coast and inland fisheries.

13. Ferries between a province and any British or foreign country or between two provinces.

14. Currency and coinage.

15. Banking, incorporation of banks, and the issue of paper money.

16. Savings banks.

17. Weights and measures.

18. Bills of exchange and promissory notes.

19. Interest.

20. Legal tender.

21. Bankruptcy and insolvency.

22. Patents of invention and discovery.
23. Copyrights.
24. Indians and lands reserved for the Indians.
25. Naturalization and aliens.
26. Marriage and divorce.
27. The criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters.
28. The establishment, maintenance, and management of penitentiaries.
29. Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this act assigned exclusively to the legislatures of the provinces.

And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this act assigned exclusively to the legislatures of the provinces.

Exclusive Powers of Provincial Legislatures.

Subjects of exclusive provincial legislation.

92. In each province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated—that is to say:

1. The amendment from time to time, notwithstanding anything in this act, of the constitution of the province, except as regards the office of lieutenant governor.
2. Direct taxation within the province in order to the raising of a revenue for provincial purposes.
3. The borrowing of money on the sole credit of the province.
4. The establishment and tenure of provincial offices and the appointment and payment of provincial officers.
5. The management and sale of the public lands belonging to the province and of the timber and wood thereon.
6. The establishment, maintenance, and management of public and reformatory prisons in and for the province.
7. The establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions in and for the province other than marine hospitals.

141 8. Municipal institutions in the province.

9. Shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a revenue for provincial, local, or municipal purposes.

10. Local works and undertakings other than such as are of the following classes:

a. Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces or extending beyond the limits of the province.

b. Lines of steamships between the province and any British of foreign country.

c. Such works as, although wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces.

11. The incorporation of companies with provincial objects.

12. The solemnization of marriage in the province.

13. Property and civil rights in the province.

14. The administration of justice in the province, including the constitution, maintenance, and organization of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts.

15. The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section.

16. Generally all matters of a merely local or private nature in the province.

Education.

Legislation respecting education.

93. In and for each province the Legislature may exclusively make laws in relation to education, subject and according to the following provisions:

(1.) Nothing in any such law shall prejudicially affect any right or privilege with re-
142 spect to denominational schools which any class of persons have by law in the province at the union.

(2.) All the powers, privileges, and duties at the union by law conferred and imposed in Upper Canada on the separate schools and school trustees of the Queen's Roman Catholic subjects shall be, and the same are hereby, extended to

the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec.

(3.) Where, in any province, a system of separate or dissentient school exists by law at the union or is thereafter established by the Legislature of the province, an appeal shall lie to the governor general in council from any act or decision of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education.

(4.) In case any such provincial law as from time to time seems to the governor general in council requisite for the due execution of the provisions of this section is not made, or in case any decision of the governor general in council on any appeal under this section is not duly executed by the proper provincial authority in that behalf, then and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section and of any decision of the governor general in council under this section.

Uniformity of Laws in Ontario, Nova Scotia, and New Brunswick.

Legislation for uniformity of laws in three provinces.

94. Nothwithstanding anything in this act, the Parliament of Canada may make provision for the uniformity of all or any of the laws relative to property and civil rights in Ontario, Nova Scotia, and New Brunswick and of the procedure of all or any of the courts in those three provinces, and from and after the passing of any act in that behalf the power of the Parliament of Canada to make laws in relation to any matter comprised in any such act shall, nothwithstanding anything in this act, be unrestricted; but any act of the Parliament of Canada making provision for such uniformity shall not have effect in any province unless and until it is adopted and enacted as law by the Legislature thereof.

Agriculture and Immigration.

Concurrent powers of legislation respecting agriculturel, &c.

95. In each province the Legislature may make laws in relation to agriculture in the
143 province and to immigration into the province, and it is hereby declared that the Parliament of Canada may from time to time make laws in relation to agriculture in all or any

of the provinces and to immigration into all or any of the provinces, and any law of the Legislature of a province relative to agriculture or to immigration shall have effect in and for the province as long and as far only as it is not repugnant to any act of the Parliament of Canada.

VII.—Judicature.

Appointment of judges.

96. The governor general shall appoint the judges of the superior, district, and county courts in each province, except those of the courts of probate in Nova Scotia and New Brunswick.

Selection of judges in Ontario, &c.

97. Until the laws relative to property and civil rights in Ontario, Nova Scotia, and New Brunswick and the procedure of the courts in those provinces are made uniform, the judges of the courts of those provinces appointed by the governor general shall be selected from the respective bars of those provinces.

Selection of judges in Quebec.

98. The judges of the courts of Quebec shall be selected from the bar of that province.

Tenure of office of judges of superior courts.

99. The judges of the superior courts shall hold office during good behaviour, but shall be removable by the governor general on address of the Senate and House of Commons.

Salaries, &c., of judges.

100. The salaries, allowances, and pensions of the judges of the superior, district, and county courts (except the courts of probate in Nova Scotia and New Brunswick), and of the admiralty courts in cases where the judges thereof are for the time being paid by salary, shall be fixed and provided by the Parliament of Canada.

General court of appeal, &c.

101. The Parliament of Canada may, notwithstanding anything in this act, from time to time provide for the constitution, maintenance, and organization of a general court of appeal for Canada, and for the establishment of any additional courts for the better administration of the laws of Canada.

VIII.—Revenues, Debts, Assets, Taxation.

Creation of consolidated revenue fund.

102. All duties and revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick before and at the union had and have power of appropriation, except such portions thereof as are by this act reserved to the respective Legislatures of the provinces, or are raised by them in accordance with the special powers conferred on them by this act, shall form one consolidated revenue

fund to be appropriated for the public service of Canada in the manner and subject to the charges in this act provided.

Expenses of collection, &c.

103. The consolidated revenue fund of Canada shall be permanently charged with the costs, charges, and expenses incident to the collection, management, and receipt thereof, and the same shall form the first charge thereon, subject to be reviewed and audited in such manner as shall be ordered by the governor general in council until the Parliament otherwise provides.

Interest of provincial public debts.

104. The annual interest of the public debts of the several Provinces of Canada, Nova Scotia, and New Brunswick at the union shall form the second charge on the consolidated revenue fund of Canada.

Salary of governor general.

105. Unless altered by the Parliament of Canada, the salary of the governor general shall be ten thousand pounds sterling money of the United Kingdom of Great Britain and Ireland, payable out of the consolidated revenue fund of Canada, and the same shall form the third charge thereon.

Appropriation from time to time.

106. Subject to the several payments by this act charged on the consolidated revenue fund of Canada, the same shall be appropriated by the Parliament of Canada for the public service.

Transfer of stocks, &c.

107. All stocks, cash, bankers' balances, and securities for money belonging to each province at the time of the union, except as in this act mentioned, shall be the property of Canada, and shall be taken in reduction of the amount of the respective debts of the provinces at the union.

Transfer of property in schedule.

108. The public works and property of each province, enumerated in the third schedule to this act, shall be the property of Canada.

Property in lands, mines, &c.

109. All lands, mines, minerals, and royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, in which the same are situate or arise, subject to any trusts existing in respect thereof and to any interest other than that of the province in the same.

Assets connected with provincial debts.

110. All assets connected with such portions of the public debt of each province as are assumed by that province shall belong to that province.

Canada to be liable to provincial debts.

145 **111**. Canada shall be liable for the debts and liabilities of each province existing at the union.

Debts of Ontario and Quebec.

112. Ontario and Quebec conjointly shall be liable to Canada for the amount (if any) by which the debt of the Province of Canada exceeds at the union sixty-two million five hundred thousand dollars, and shall be charged with interest at the rate of five per centum per annum thereon.

Assets of Ontario and Quebec.

113. The assets enumerated in the fourth schedule to this act belonging at the union to the Province of Canada shall be the property of Ontario and Quebec conjointly.

Debt of Nova Scotia.

114. Nova Scotia shall be liable to Canada for the amount (if any) by which its public debt exceeds at the union eight million dollars, and shall be charged with interest at the rate of five per centum per annum thereon.

Debt of New Brunswick.

115. New Brunswick shall be liable to Canada for the amount (if any) by which its public debt exceeds at the union seven million dollars, and shall be charged with interest at the rate of five per centum per annum thereon.

Payment of interest to Nova Scotia and New Brunswick.

116. In case the public debts of Nova Scotia and New Brunswick do not at the union amount to eight million and seven million dollars, respectively, they shall respectively receive, by half-yearly payments in advance from the government of Canada, interest at five per centum per annum on the difference between the actual amounts of their respective debts and such stipulated amounts.

Provincial public property.

117. The several provinces shall retain all their respective public property not otherwise disposed of in this act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the country.

Grants to provinces.

118. The following sums shall be paid yearly by Canada to the several provinces for the support of their governments and legislatures:

	Dollars.
Ontario	Eighty thousand.
Quebec	Seventy thousand.
Nova Scotia	Sixty thousand.
New Brunswick	Fifty thousand.
	Two hundred and sixty thousand,

and an annual grant in aid of each province shall be made equal to eighty cents per head of the population as ascertained by the census of one thousand eight hundred and sixty-one,
146 and in the case of Nova Scotia and New Brunswick by each subsequent decennial census until the population of each of those two

provinces amounts to four hundred thousand souls, at which rate such grant shall thereafter remain. Such grants shall be in full settlement of all future demands on Canada, and shall be paid half-yearly in advance to each province; but the government of Canada shall deduct from such grants, as against any province, all sums chargeable as interest on the public debt of that province in excess of the several amounts stipulated in this act.

Further grant to New Brunswick.

119. New Brunswick shall receive, by half-yearly payments in advance, from Canada, for the period of ten years from the union, an additional allowance of sixty-three thousand dollars per annum; but as long as the public debt of that province remains under seven million dollars a deduction equal to the interest at five per centum per annum on such deficiency shall be made from that allowance of sixty-three thousand dollars.

Form of payments.

120. All payments to be made under this act or in discharge of liabilities created under any act of the Provinces of Canada, Nova Scotia, and New Brunswick, respectively, and assumed by Canada shall, until the Parliament of Canada otherwise directs, be made in such form and manner as may from time to time be ordered by the governor general in council.

Canadian manufactures, &c.

121. All articles of the growth, produce, or manufacture of any one of the provinces shall, from and after the union, be admitted free into each of the other provinces.

Continuance of customs and excise laws.

122. The customs and excise laws of each province shall, subject to the provisions of this act, continue in force until altered by the Parliament of Canada.

Exportation and importation as between two provinces.

123. Where customs duties are, at the union, leviable on any goods, wares, or merchandises in any two provinces, those goods, wares, and merchandises may, from and after the union, be imported from one of those provinces into the other of them on proof of payment of the customs duty leviable thereon in the province of exportation and on payment of such further amount (if any) of customs duty as is leviable thereon in the province of importation.

Lumber dues in New Brunswick.

124. Nothing in this act shall affect the right of New Brunswick to levy the lumber dues provided in chapter fifteen of title three of the Revised Statutes of New Brunswick or in any act amending that act before or after the union, and not increasing the amount of

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such dues; but the lumber of any of the provinces other than New Brunswick shall not be subject to such dues.

Exemption of public lands, &c.

125. No lands or property belonging to Canada or any province shall be liable to taxation.

Provincial consolidated revenue fund.

126. Such portions of the duties and revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick had, before the union, power of appropriation as are by this act reserved to the respective governments or legislatures of the provinces, and all duties and revenues raised by them in accordance with the special powers conferred upon them by this act, shall in each province form one consolidated revenue fund to be appropriated for the public service of the province.

IX.—Miscellaneous Provisions.

General.

As to legislative councillors of provinces becoming senators.

127. If any person, being at the passing of this act a member of the Legislative Council of Canada, Nova Scotia, or New Brunswick, to whom a place in the senate is offered does not, within thirty days thereafter, by writing, under his hand, addressed to the governor general of the Province of Canada or to the lieutenant governor of Nova Scotia or New Brunswick (as the case may be), accept the same, he shall be deemed to have declined the same; and any person who, being at the passing of this act a member of the Legislative Council of Nova Scotia or New Brunswick, accepts a place in the senate shall thereby vacate his seat in such Legislative Council.

Oath of allegiance, &c.

128. Every member of the Senate or House of Commons of Canada shall, before taking his seat therein, take and subscribe before the governor general or some person authorized by him, and every member of a legislative council or legislative assembly of any province shall, before taking his seat therein, take and subscribe, before the lieutenant governor of the province or some person authorized by him, the oath of allegiance contained in the fifth schedule to this act; and every member of the senate of Canada and every member of the Legislative Council of Quebec shall also, before taking his seat therein, take and subscribe, before the governor general or some person authorized by him, the declaration of qualification contained in the same schedule.

Continuance of existing laws, courts, officers, &c.

129. Except as otherwise provided by this act, all laws in force in Canada, Nova Scotia, or
148 New Brunswick at the union and all courts of civil and criminal jurisdiction and all legal commissions, powers, and authorities and all officers, judicial, administrative, and ministerial, existing therein at the union shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick, respectively, as if the union had not been made; subject, nevertheless (except with respect to such as are enacted by or exist under acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished, or altered by the Parliament of Canada or by the Legislature of the respective province, according to the authority of the Parliament or of that Legislature under this act.

Transfer of officers to Canada.

130. Until the Parliament of Canada otherwise provides all officers of the several provinces having duties to discharge in relation to matters other than those coming within the classes of subjects by this act assigned exclusively to the legislatures of the provinces shall be officers of Canada and shall continue to discharge the duties of their respective offices under the same liabilities, responsibilities, and penalties as if the union had not been made.

Appointment of new officers.

131. Until the Parliament of Canada otherwise provides the governor general in council may, from time to time, appoint such officers as the governor general in council deems necessary or proper for the effectual execution of this act.

Treaty obligations.

132. The Parliament and government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any province thereof, as part of the British Empire, towards foreign countries arising under treaties between the empire and such foreign countries.

Use of English and French languages.

133. Either the English or the French language may be used by any person in the debates of the houses of the Parliament of Canada and of the houses of the Legislature of Quebec, and both those languages shall be used in the respective records or journals of those houses; and either of those languages may be used by any person or in any pleading or process in or issuing from any court of Canada established under this act and in or from all or any of the courts of Quebec.

The acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those languages.

Ontario and Quebec.

Appointment of executive officers for Ontario and Quebec.

134. Until the Legislature of Ontario or of Quebec otherwise provides the lieutenant
149 governors of Ontario and Quebec may each appoint, under the great seal of the province, the following officers, to hold office during pleasure—that is to say: The attorney general, the secretary and registrar of the province, the treasurer of the province, the commissioner of crown lands and the commissioner of agriculture and public works, and, in the case of Quebec, the solicitor general; and may, by order of the lieutenant governor in council, from time to time prescribe the duties of those officers and of the several departments over which they shall preside or to which they shall belong and of the officers and clerks thereof, and may also appoint other and additional officers to hold office during pleasure, and may from time to time prescribe the duties of those officers and of the several departments over which they shall preside or to which they shall belong and of the officers and clerks thereof.

Powers, duties, &c., of executive officers.

135. Until the Legislature of Ontario or Quebec otherwise provides all rights, powers, duties, functions, responsibilities, or authorities at the passing of this act vested in or imposed on the attorney general, solicitor general, secretary and registrar of the Province of Canada, minister of finance, commissioner of crown lands, commissioner of public works, and minister of agriculture and receiver general, by any law, statute, or ordinance of Upper Canada, Lower Canada, or Canada and not repugnant to this act, shall be vested in or imposed on any officer to be appointed by the lieutenant governor for the discharge of the same or any of them; and the commissioner of agriculture and public works shall perform the duties and functions of the office of minister of agriculture at the passing of this act imposed by the law of the Province of Canada as well as those of the commissioner of public works.

Great seal.

136. Until altered by the lieutenant governor in council the great seals of Ontario and Quebec, respectively, shall be the same or of the same design as those used in the Province of Upper Canada and Lower Canada, respectively, before their union as the Province of Canada.

Construction of temporary acts.

137. The words "and from thence to the end of the then next ensuing session of the Legislature," or words to the same effect, used in any

temporary act of the Province of Canada not expired before the union shall be construed to extend and apply to the next session of the Parliament of Canada, if the subject-matter of the act is within the powers of the same as defined by this act, or to the next sessions of the Legislatures of Ontario and Quebec, respectively, if the subject-matter of the act is within the powers of the same as defined by this act.

As to errors in names.

138. From and after the union the use of the words "Upper Canada" instead of "Ontario," or "Lower Canada" instead of "Quebec" in any deed, writ, process, pleading, document, matter, or thing shall not invalidate the same.

As to issue of proclamations before union to commence after union.

139. Any proclamation under the great seal of the Province of Canada issued before the union to take effect at a time which is subsequent to the union, whether relating to that province, or to Upper Canada, or to Lower Canada, and the several matters and things therein proclaimed shall be and continue of like force and effect as if the union had not been made.

As to issue of proclamations after union.

140. Any proclamation which is authorized by any act of the Legislature of the Province of Canada to be issued under the great seal of the Province of Canada, whether relating to that province or to Upper Canada or to Lower Canada, and which is not issued before the union, may be issued by the lieutenant governor of Ontario or of Quebec, as its subject-matter requires, under the great seal thereof; and from and after the issue of such proclamation the same and the several matters and things therein proclaimed shall be and continue of the like force and effect in Ontario or Quebec as if the union had not been made.

Penitentiary.

141. The penitentiary of the Province of Canada shall, until the Parliament of Canada otherwise provides, be and continue the penitentiary of Ontario and of Quebec.

Arbitration respecting debts, &c.

142. The division and adjustment of the debts, credits, liabilities, properties, and assets of Upper Canada and Lower Canada shall be referred to the arbitrament of three arbitrators, one chosen by the government of Ontario, one by the government of Quebec, and one by the government of Canada, and the selection of the arbitrators shall not be made until the Parliament of Canada and the Legislatures of Ontario and Quebec have met; and the arbitrator chosen by the govern-

ment of Canada shall not be a resident either in Ontario or in Quebec.

Division of records.

143. The governor general in council may from time to time order that such and so many of the records, books, and documents of the Province of Canada as he thinks fit shall be appropriated and delivered either to Ontario or to Quebec, and the same shall thenceforth be the property of that province; and any copy thereof or extract therefrom, duly certified by the officer having charge of the original thereof, shall be admitted as evidence.

Constitution of townships in Quebec.

144. The lieutenant governor of Quebec may from time to time, by proclamation under the great seal of the province, to take effect from a day to be appointed therein, constitute townships in those parts of the Province of Quebec in which townships are not then already constituted and fix the metes and bounds thereof.

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X.—Intercolonial Railway.

Duty of government and Parliament of Canada to make railway herein described.

145. Inasmuch as the Provinces of Canada, Nova Scotia, and New Brunswick have joined in a declaration that the construction of the Intercolonial railway is essential to the consolidation of the union of British North America and to the assent thereto of Nova Scotia and New Brunswick, and have consequently agreed that provision should be made for its immediate construction by the government of Canada, therefore, in order to give effect to that agreement, it shall be the duty of the government and Parliament of Canada to provide for the commencement, within six months after the union, of a railway connecting the River St. Lawrence with the city of Halifax, in Nova Scotia, and for the construction thereof without intermission and the completion thereof with all practicable speed.

XI.—Admission of Other Colonies.

Power to admit Newfoundland, &c., into the union.

146. It shall be lawful for the Queen, by and with the advice of Her Majesty's most honorable privy council, on addresses from the Houses of the Parliament of Canada, and from the houses of the respective legislatures of the colonies or Provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those colonies or provinces or any of them into the union, and on address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-

western Territory, or either of them, into the union on such terms and conditions in each case as are in the addresses expressed and as the Queen thinks fit to approve, subject to the provisions of this act; and the provisions of any order in council in that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

As to representation of Newfoundland and Prince Edward Island in senate.

147. In case of the admission of Newfoundland and Prince Edward Island, or either of them, each shall be entitled to a representation in the senate of Canada of four members, and (notwithstanding anything in this act) in case of the admission of Newfoundland the normal number of senators shall be seventy-six and their maximum number shall be eighty-two; but Prince Edward Island when admitted shall be deemed to be comprised in the third of the three divisions into which Canada is in relation to the constitution of the senate divided by this act, and accordingly after the admission of Prince Edward Island, whether Newfoundland is admitted or not, the representation of Nova Scotia and New Brunswick in the senate shall, as vacancies occur, be reduced from twelve to ten members, respectively, and the representation of each of those provinces shall not be increased at any time beyond ten, except under the provisions of this act for the appointment of three or six additional senators under the direction of the Queen.

SCHEDULES.

THE FIRST SCHEDULE.

Electoral Districts of Ontario.

A.

Existing electoral divisions.

Counties.

1. Prescott.
2. Glengarry.
3. Stormont.
4. Dundas.
5. Russell.
6. Carleton.
7. Prince Edward.
8. Halton.
9. Essex.

Ridings of Counties.

10. North riding of Lanark.
11. South riding of Lanark.

12. North riding of Leeds and north riding of Grenville.
13. South riding of Leeds.
14. South riding of Grenville.
15. East riding of Northumberland.
16. West riding of Northumberland (excepting therefrom the township of South Monaghan).
17. East riding of Durham.
18. West riding of Durham.
19. North riding of Ontario.
20. South riding of Ontario.
21. East riding of York.
153 22. West riding of York.
23. North riding of York.
24. North riding of Wentworth.
25. South riding of Wentworth.
26. East riding of Elgin.
27. West riding of Elgin.
28. North riding of Waterloo.
29. South riding of Waterloo.
30. North riding of Brant.
31. South riding of Brant.
32. North riding of Oxford.
33. South riding of Oxford.
34. East riding of Middlesex.

Cities, Parts of Cities, and Towns.

35. West Toronto.
36. East Toronto.
37. Hamilton.
38. Ottawa.
39. Kingston.
40. London.
41. Town of Brockville, with the township of Elizabethtown thereto attached.
42. Town of Niagara, with the township of Niagara thereto attached.
43. Town of Cornwall, with the township of Cornwall thereto attached.

B.

New Electoral Divisions.

44. The provisional judicial district of Algoma.
The county of Bruce, divided into two ridings, to be called, respectively, the north and south ridings:
45. The north riding of Bruce to consist of the townships of Bury, Lindsay, Eastnor, Albemarle, Amable, Arran, Bruce, Elderslie and Saugeen, and the village of Southampton.
46. The south riding of Bruce to consist of the townships of Kin-

cardine (including the village of Kincardine), Greenock, Brant, Huron, Kinloss, Culross, and Carrick.

154 The county of Huron, divided into two ridings, to be called, respectively, the north and south ridings:

47. The north riding to consist of the townships of Ashfield, Wawanosh, Turnberry, Howick, Morris, Grey, Colborne, Hullett, including the village of Clinton, and McKillop.

48. The south riding to consist of the town of Goderich and the township of Goderich, Tuckersmith, Stanley, Hay, Usborne, and Stephen.

The county of Middlesex, divided into three ridings, to be called, respectively, the north, west, and east ridings:

49. The north riding to consist of the townships of McGillivray and Biddulph (taken from the county of Huron) and Williams East, Williams West, Adelaide, and Lobo.

50. The west riding to consist of the townships of Delaware, Carradoc, Metcalf, Mosa, and Ekfrid, and the village of Strathroy.

(The east riding to consist of the townships now embraced therein and be bounded as it is at present.)

51. The county of Lambton to consist of the townships of Bosanquet, Warwick, Plympton, Sarnia, Moore, Enniskillen, and Brooke, and the town of Sarnia.

52. The county of Kent to consist of the townships of Chatham, Dover, East Tilbury, Romney, Raleigh, and Harwich, and the town of Chatham.

53. The county of Bothwell to consist of the townships of Sombra, Dawn, and Euphemia (taken from the county of Lambton), and the townships of Zone, Camden, with the gore thereof, Orford, and Howard (taken from the county of Kent).

The county of Grey, divided into two ridings, to be called, respectively, the south and north ridings:

54. The south riding to consist of the townships of Bentinck, Glenelg, Artemesia, Osprey, Normanby, Egremont, Proton, and Melancthon.

155 55. The north riding to consist of the townships of Collingwood, Euphrasia, Holland, Saint Vincent, Sydenham, Sullivan, Derby, and Keppel, Sarawak, and Brooke, and the town of Owen Sound.

The county of Perth, divided into two ridings, to be called, respectively, the south and north ridings:

56. The north riding to consist of the townships of Wallace, Elma, Logan, Ellice, Mornington, and North Easthope, and the town of Stratford.

57. The south riding to consist of the townships of Blanchard, Downie, South Easthope, Fullarton, Hibbert, and the villages of Mitchell and Ste. Mary's.

The county of Wellington, divided into three ridings, to be called, respectively, north, south, and center ridings:

58. The north riding to consist of the townships of Amaranth, Arthur, Luther, Minto, Maryborough, Peel, and the village of Mount Forest.

59. The center riding to consist of the townships of Garafraxa, Erin, Eramosa, Nichol, and Pilkington, and the villages of Fergus and Elora.

60. The south riding to consist of the town of Guelph and the townships of Guelph and Puslinch.

The county of Norfolk, divided into two ridings, to be called, respectively, the south and north ridings:

61. The south riding to consist of the townships of Charlotteville, Houghton, Walsingham, and Woodhouse, and with the gore thereof.

62. The north riding to consist of the townships of Middleton, Townsend, and Windham, and the town of Simcoe.

63. The county of Haldimand to consist of the townships of Oneida, Seneca, Cayuga north, Cayuga south, Rainham, Walpole, and Dunn.

64. The county of Monck to consist of the townships of Canborough and Moulton and Sherbrooke, and the village of Dunnville (taken from the county of Haldimand), the townships of Caister and Gainsborough (taken from the county of Lincoln), and the townships of Pelham and Wainfleet (taken from the county of Welland).

156 65. The county of Lincoln to consist of the townships of Clinton, Grantham, Grimsby, and Louth, and the town of St. Catherines.

66. The county of Welland to consist of the townships of Bertie, Crowland, Humberstone, Stamford, Thorold, and Willoughby, and the villages of Chippewa, Clifton, Fort Erie, Thorold, and Welland.

67. The county of Peel to consist of the townships of Chinguacousy, Toronto, and the gore of Toronto, and the villages of Brampton and Streetsville.

68. The county of Cardwell to consist of the townships of Albion and Caledon (taken from the county of Peel), and the townships of Adjala and Mono (taken from the county of Simcoe).

The county of Simcoe, divided into two ridings, to be called, respectively, the south and north ridings:

69. The south riding to consist of the townships of West Gwillimbury, Tecumseth, Innisfil, Essa, Tossorontio, Mulmur, and the village of Bradford.

70. The north riding to consist of the townships of Nottawasaga, Sunnidale, Vespra, Flos, Oro, Medonte, Orillia, and Matchedash, Tiny and Tay, Balaklava and Robinson, and the towns of Barrie and Collingwood.

The county of Victoria, divided into two ridings, to be called, respectively, the south and north ridings:

71. The south riding to consist of the townships of Ops, Mariposa, Emily, Verulum, and the town of Lindsay.

72. The north riding to consist of the townships of Anson, Bexley, Carden, Dalton, Digby, Eldon, Fenelon, Hindon, Laxton, Lutterworth, Macaulay, and Draper, Sommerville, and Morrison, Muskoka, Monck, and Watt (taken from the county of Simcoe), and any other surveyed townships lying to the north of the said north riding.

The county of Peterborough, divided into two ridings, to be called, respectively, the west and east ridings:

157 73. The west riding to consist of the townships of South Monaghan (taken from the county of Northumberland), North Monaghan, Smith, and Ennismore, and the town of Peterborough.

74. The east riding to consist of the townships of Asphodel, Belmont, and Methuen, Douro, Dummer, Galway, Harvey, Minden, Stanhope and Dysart, Otonabee and Snowden, and the village of Ashburnham, and any other surveyed townships lying to the north of the said east riding.

The county of Hastings, divided into three ridings, to be called, respectively, the west, east, and north ridings:

75. The west riding to consist of the town of Belleville, the township of Sydney, and the village of Trenton.

76. The east riding to consist of the townships of Thurlow, Tyendinaga, and Hungerford.

77. The north riding to consist of the townships of Rawdon, Huntingdon, Madoc, Elzevir, Tudor, Marmora, and Lake, and the village of Stirling, and any other surveyed townships lying to the north of the said north riding.

78. The county of Lennox to consist of the townships of Richmond, Adolphustown, North Fredericksburgh, South Fredericksburgh, Ernest Town, and Amherst Island, and the village of Napanee.

79. The county of Addington to consist of the townships of Camden, Portland, Sheffield, Hinchinbrooke, Kaladar, Kennebec, Olden, Oso, Anglesea, Barrie, Clarendon, Palmerston, Effingham, Abinger, Miller, Canonto, Denbigh, Loughborough, and Bedford.

80. The county of Frontenac to consist of the townships of Kingston, Wolfe Island, Pittsburgh, and Howe Island, and Storrington.

The county of Renfrew, divided into two ridings, to be called, respectively, the south and north ridings:

81. The south riding to consist of the townships of McNab, Bagot, Blithfield, Brougham, Horton, Admaston, Grattan, Matawatchan, Griffith, Lyndoch, Raglan, Radcliffe, Brudenell, Sebastopol, and the villages of Arnprior and Renfrew.

158 82. The north riding to consist of the townships of Ross, Bromley, Westmeath, Stafford, Pembroke, Wilberforce, Alice, Petawawa, Buchanan, South Algona, North Algona, Fraser, McKay, Wylie, Rolph, Head, Maria, Clara, Haggerty, Sherwood, Burns, and Richards, and any other surveyed townships lying northwesterly of the said north riding.

Every town and incorporated village existing at the union, not specially mentioned in this schedule, is to be taken as part of the county or riding within which it is locally situate.

The Second Schedule.

Electoral Districts of Quebec Specially Fixed.

Counties of—

Pontiac.	Missisquoi.	Compton.
Ottawa.	Brome.	Wolfe and Richmond.
Argenteuil.	Shefford.	Megantic.
Huntingdon.	Stanstead.	

Town of Sherbrooke.

The Third Schedule.

Provincial Public Works and Property to be the Property of Canada.

1. Canals, with lands and water power connected therewith.
2. Public harbours.
3. Light-houses and piers and Sable Island.
4. Steamboats, dredges, and public vessels.
5. Rivers and lake improvements.
6. Railways and railway stocks, mortgages, and other debts due by railway companies.
7. Military roads.

159 8. Custom-houses, post offices, and all other public buildings, except such as the government of Canada appropriate for the use of the provincial legislatures and governments.

9. Property transferred by the imperial government and known as ordnance property.

10. Armouries, drill sheds, military clothing and munitions of war, and lands set apart for general public purposes.

The Fourth Schedule.

Assets to be the Property of Ontario and Quebec Conjointly.

Upper Canada building fund.
Lunatic asylums.
Normal school.
Court-houses in Aylmer, Montreal, Kamouraska, } Lower Canada.
Law Society, Upper Canada.
Montreal turnpike trust.
University permanent fund.
Royal institution.
Consolidated municipal loan fund, Upper Canada.
Consolidated municipal loan fund, Lower Canada.

Agricultural Society, Upper Canada.
Lower Canada legislative grant.
Quebec fire loan.
Tamiscouata advance account.
Quebec turnpike trust.
Education—east.
Building and jury fund, Lower Canada.
Municipalities fund.
Lower Canada superior education income fund.

160 THE FIFTH SCHEDULE.

Oath of Allegiance.

I, A B, do swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria.

NOTE.—The name of the King or Queen of the United Kingdom of Great Britain and Ireland for the time being is to be substituted from time to time with proper terms of reference thereto.

Declaration of Qualification.

I, A B, do declare and testify that I am by law duly qualified to be appointed a member of the senate of Canada [or as the case may be], and that I am legally or equitably seised as of freehold for my own use and benefit of lands or tenements held in free and common socage (or seised or possessed for my own use and benefit of lands or tenements held in Franc-alleu or in Roture (as the case may be) in the Province of Nova Scotia (or as the case may be) of the value of four thousand dollars over and above all rents, dues, debts, mortgages, charges, and incumbrances due or payable out of or charged on or affecting the same, and that I have not collusively or colourably obtained a title to or become possessed of the said lands and tenements or any part thereof for the purpose of enabling me to become a member of the senate of Canada (or as the case may be), and that my real and personal property are together worth four thousand dollars over and above my debts and liabilities.

161 12.

Affidavit of John S. Archibald and G. N. Robertson.

Circuit Court of the United States, District of Massachusetts. In Equity.

BATE REFRIGERATING COMPANY, Complainant,
v.
GEORGE H. HAMMOND AND COMPANY, Defendant.

DOMINION OF CANADA,
Province of Quebec, City and District of Montreal:

John S. Archibald, of the said city of Montreal, advocate, being duly sworn, deposes and says:

I am forty-three years of age, and I reside at Montreal. I have been a duly admitted practitioner of law in Canada for the past sixteen years, and during the course of my experience have come to be familiar with the law and practice in Canada concerning patents for inventions.

Under the provisions of the Canadian law relating to patents the issue of a patent for an invention cannot take place until after the applicant has complied with the conditions prerequisite to such issue, as set forth in the statute, and the minister of justice has examined the proposed patent and certified to its conformity with the law. It may then be signed and sealed by the commissioner,
162 and, after being duly registered, will avail to the grantee thereof. (See sections 11 to 19 of the Canadian patent act of 1872.)

Among the conditions precedent to the issue of a patent is the condition prescribed in section 15 of the act, to wit, that "the applicant shall also deliver to the commissioner, unless dispensed from so doing for some good reason, a neat working model of his invention on a convenient scale, exhibiting its several parts in due proportion whenever the invention admits of such model."

In cases where a model is required, but is not produced with the petition, it is a well-established custom adopted by the commissioner of patents to sign, seal, and register patents of invention so soon as they are otherwise approved, and thereupon to notify the applicant that the patent has been granted and will be issued to him so soon as he complies with the condition requiring the production of a model, and the commissioner will decline to deliver to any patentee any letters patent so held in suspense until compliance with his demand for the production of such model.

This practice has recently been held valid and within the power of the commissioner of patents in a certain cause adjudged in the superior court for the Province of Quebec, wherein the Hon. Sir Alexander Campbell was plaintiff *v.* John Jones Bate *es qual.*, defendant, and The Cunard Steamship Company and others, *tiers opposants*, said judgment dated June 30th, 1886.

The same doctrine was also held in a case decided in the high court of justice in the Province of Ontario in a cause wherein attorney general of Canada was plaintiff and Stephen N. Smith was defendant upon *scire facias*, said judgment rendered in January, 1885.

163 Prior to the date of issue the patent is still under control of the commissioner of patents, and the rights designed to be thereby secured are not perfected or made available except by the issue of the patent.

No suit could be maintained for the infringement of a patent unless the letters had been patented or issued to the inventor. It is repugnant to our law that a patent for an invention which is a grant from the Crown should exist upon terms and conditions differing from those agreed to by the officers representing the Crown. By the effect of the established practice above referred to, which practice is a matter of common knowledge, it is well understood that the commissioner of patents does not intend to confer upon any applicant for a

patent the exclusive rights mentioned in the letters patent unless and until said applicant has complied with the commissioner's demand for the flying of a model, the production of such model being part of the consideration intended by the Crown, through its officers, to be secured for the privileges granted by the patent.

Under the practice of our patent office it is customary to date the letters patent upon the day they are signed, and thereupon, in cases requiring it, to make a demand for the production of the model, announcing at the same time that said letters patent will be issued when such model is produced. If no model should be produced during the period mentioned in the letters patent for their duration no perfected or valid patent would ever have existed.

The effect of the judgments of our courts above mentioned is to hold that the issuance of a patent held in suspense for non-
164 production of model retroacts so as to complete the patent and render it valid from its date.

By virtue of an act of the Canadian Parliament, assented to on the 25th day of May, 1883, and entitled "An act to amend the patent act of 1872," 46 Victoria, chap. 19, all patents in force on the day of the passage of such act to amend were and are deemed to have been originally issued for a term of fifteen years, subject only — cease if certain fees should not have been or should not be paid.

The said act of May 25th, 1883, is valid and effectual and has been so held in the case hereinbefore referred to; under the constitutional system of Canada, where the subject-matter of any legislation is within the jurisdiction of Parliament, its decisions are of sovereign authority and their validity cannot be questioned by the courts.

JOHN S. ARCHIBALD.

Sworn before me, at the city of Montreal, on the sixth day of April, A. D. 1887.

[SEAL.] WILLIAM McLENNAN, *N. P.*

I, G. N. Robertson, of the city of Montreal, Esquire, advocate Queen's counsel, depose as follows:

I am an advocate of thirty-four years' experience in the city of Montreal. During the course of my practice I have become acquainted with matters concerning the practice and law of patents in the Dominion of Canada. I have read the foregoing affidavit
165 of John S. Archibald, Esq., and I concur therein and state it as my opinion that under the law and practice of patents in Canada the opinions therein expressed are correct.

G. N. ROBERTSON.

Sworn before me, at the city of Montreal, on this sixth day of April, A. D. 1887.

[SEAL.] WILLIAM McLENNAN, *N. P.*

166 13.

THE LEGAL NEWS.

Decision "St. Andrew's Church."

Court of Queen's Bench.

MONTREAL, *Jan.* 20, 1883.

MINISTER AND TRUSTEES OF ST. ANDREW'S CHURCH, MONTREAL (Def'ts Below), Appellants,

and

BOARD FOR THE MANAGEMENT OF THE TEMPORALITIES FUND OF THE Presbyterian Church of Canada in Connection with the Church of Scotland (Pl'ffs Below), Respondents.

Retrospective legislation—45 Vict. (Can.), cap. 124.

Held, that the act 45 Vict. (Can.), cap. 124, confirming and ratifying all acts and doings of the board of temporalities since the passing of the 38 Vict., cap. 64, was sufficient to sustain an action instituted by the board before the passing of the 45 Vict., and the Dominion Parliament had authority to enact said statute, although the privy council in England had by their judgment in Dobie & Temporalities declared the board to be illegally constituted.

DORION, *C. J.*, RAMSAY, TESSIER, & BABY, *JJ.*:

In this case the right of the board for the management of the temporalities fund to collect the amount of a mortgage dating back to the year 1860 was called in question. The action, it may be stated, was taken out after the judgment in the superior court dissolving the injunction in the Dobie case, but before the final judgment of the judicial committee of the privy council declaring the Quebec act, 38 Vict., chap. 64, to be unconstitutional. (5 L. N., 58.)

The court below maintained the action, whereupon the present appeal was instituted.

Macmaster, for the appellants, said the main pretension of his clients was this: The persons who call upon us to pay are not the persons to whom we owe the amount sought to be recovered. The indebtedness of the appellants, if any, was to a corporation created by an act of the late Province of Canada (22 Vict., cap. 66), and the plaintiffs (now respondents) are not such corporation; but the persons now suing are a corporation existing and illegally administering and constituted under an act of the Quebec Legislature, 38 Victoria, which act was illegal and unconstitutional and could confer no right upon the respondents to collect the debt sued for or to grant a legal receipt therefor. The validity of the Quebec
167 statute had been contested before the courts in the Dobie case, and a provisional injunction had been issued restraining the present respondents from administering or acting as a board. The

privy council had declared the Quebec statute to be unconstitutional and *ultra vires*, so that the pretention of the appellants had been fully sustained.

Morris, for the respondents, submitted that the contract which formed the basis of the action was made as long ago as 1860, and there was no question, therefore, as to the indebtedness. The right of the respondents to sue for the recovery of this debt was not dependent on the constitutionality of the Quebec statute, 38th Victoria; that was merely an amending act, and the judgment by which it had been declared unconstitutional had the effect of leaving the original act of incorporation still in force. It was from this original charter that the respondents derived their right. Being a duly incorporated body, they had a right to collect their debts and enforce payment of dues. It had been said that the respondents were restrained by an injunction from acting or administering as a board, but the fact was that the injunction in the Dobie case was quashed by the judgment of the superior court before the present action was taken out. The injunction once dissolved could not be restored by an appeal, and there was nothing to prevent the respondents from administering and collecting debts. The appellants had no right by a plea to an action of debt to criticise the election of the board. Directors *de facto* are *prima facie* directors *de jure*, and their receipt is a valid discharge. The only interest of the appellants was to pay to a party whose receipt would hold good. It was also submitted that by the by-laws the respondents had a right to sue. The chairman holds office until his successors are legally elected. If the election under the Quebec act of 1875 was invalid the chairman was still entitled to administer until a new and valid election had taken place. In conclusion, it was submitted that by a public act of the Dominion Parliament, which had not been attacked, the proceedings of the board elected in 1876 were ratified and confirmed; therefore the appellants in any case were not entitled to have the action dismissed. The judgment of the court below should be confirmed, even if the costs were awarded against the respondents.

Some discussion ensued as to the effect of the Dominion act referred to (45 Vict., cap. 124) upon pending cases. Subsequently a rehearing was allowed on this point, at which—

Macmaster, for the appellants, submitted: The statute of Canada, 45 Vic., cap. 124, is not retroactive saving as expressly specified. It does not reanimate the unconstitutional act of Quebec, 38 Vic., cap. 64. It merely confirms and ratifies all "acts and doings" of the board and of the acting members thereof since the act 38 Vic., cap. 64, was passed—"had thereunder"—that is, in virtue of 38 Vic., cap. 64. These "acts and doings" can only mean acts and doings contemplated by the provisions of the (unconstitutional) act, 38 Vic., cap. 64, such as the payment of a subsidy to Queen's College, the payment of increased allowances to ministers, &c., provisions in excess of the terms of the original statute, 22 Vic., cap. 66; but the right to sue is not conferred by the unconstitutional amendment, and the present action could not have been instituted

by virtue of its provisions. The suit is not therefore ratified and confirmed by the Canada act, 45 Vic., cap. 124. As respondents say in their factum, it is not from the amending act (38 Vic., cap. 64) that the respondents derive their right to hold property and collect their debts, but from their original charter. It is true that the right to sue is derived from the original charter, but the plaintiffs here attempting to collect are not the corporation created by the original charter with 38 Vic., cap. 64, superadded. The defendants do not owe respondents, whose head was lopped off by the decision of the privy council and has not been restored by the recent act (45 Vic., cap. 124) of the Parliament of Canada. They owe the old corporation—1. The defendants owe to the old corporation (22 Vic., c. 66), and there is no privity of contract with the corporation suing. 2. The corporation created by 22 Vic., cap. 66, and 38 Vic., cap. 64, claim from defendants by the present suit. 3. Defendants say they do not owe this new corporation; that it is an illegal body, and that the judgment of the privy council in Dobie *v.* Temporalities Board annulled 38 Vic., cap. 64. 4. There is nothing in statute of Canada, 45 Vic., cap. 124, which revives the annulled statute, 38 Vic., cap. 64, and restores to plaintiffs the corporate character and qualities they assumed at the time they instituted this action. The
168 new Canadian statute is not retroactive to the extent of re-establishing the corporation now suing.

Morris, for the respondents, said if the court was against him on the merits he did not rely upon the statute except to this extent, that the court might confirm the judgment and dispense the respondents from the necessity of bringing a new action. In that event, however, he did not pretend that the costs should be given in his favor.

RAMSAY, *J.* (dissenting):

This action was brought for the recovery of a mortgage debt of $1,000 and $120 interest. The respondents acted under the authority of a statute of the Legislature of the Province of Quebec which purported to authorize the formation of the board respondent in a different manner from that settled by the original act of incorporation. The object of this amendment was to enable a new body, to be called "The Presbyterian Church of Canada," being a union of certain Presbyterian churches, under certain conditions to take possession of the property formerly belonging to a body known as the Presbyterian Church of Canada in connection with the Church of Scotland.

The appellant pleaded that the plaintiff respondent was not the party to whom he was indebted; that the act of the Province of Quebec in question, 38 Vic., c. 64, was beyond the powers of a local legislature, and that therefore the board respondent was not organized by law and could not recover.

There is no controversy as to the facts, it being admitted that the board respondent was acting under the authority of the local amendment. Judgment was rendered on this issue on the 28th of April, 1881, after the judgment in this court in Dobie and the Trustees, declaring that the act in question was not *ultra vires*, and the judg-

ment of the court below was given in conformity with the opinion expressed by the majority of this court in that case. Subsequently the decision in the case of Dobie was reversed in the privy council, and the local act in question was declared to be an act beyond the powers of legislation conferred on local legislatures by the British North America act. This is not denied, but respondent argues that appellant is the debtor of the board, and that consequently appellant cannot incidentally raise the question of the legality of the organization of the board. The fallacy of this argument is plain. If the body respondent were the same body, and that the defect were only as to its proceedings, the principle invoked would be applicable and conclusive; but it is contended and, I think, distinctly admitted that the board is improperly constituted, not only as to its individual members, but that it is a different body, avowedly acting in different interests, and in a capacity hostile to the real intentions of the body whose name it purloined. If we were to condemn appellants on this issue we should, in effect, say, "You who are enjoined not to make or meddle with the temporalities of the Church of Scotland may compel a debtor to pay you." This seems to me to be an impossible conclusion. It is idle to say appellant had no interest to raise the question. Appellant had the most material reason for refusing to pay the wrong person, namely, to avoid paying twice. At the argument, however, another question arose which had not been pleaded or it seems contemplated, namely, that on the 17th May, 1882, more than a year after the rendering of the judgment in the court below, Parliament passed an act containing this provision:

"1. Notwithstanding anything in the said act of the late Province of Canada relating to the said temporalities fund or amendments thereto, all the acts and doings of the said board and of the acting members thereof from and since the passing of the said act of the Province of Quebec, thirty-eight Victoria, chapter sixty-four, had thereunder, are hereby ratified and confirmed, and the present acting members of the said board are hereby authorized to hold office and administer the said fund according to the terms of this act until replaced by otliers elected hereunder."

The rule of the Roman law as applying to the lawgiver is that he ought not to legislate so as to affect rights acquired in the past and so disturb existing legal relations. "*Cum conveniat leges futuris regulas imponere, non præteritis culumnias excitare.*" C. 10, 31, l. 65. For the judge it becomes a rule of interpretation of statutes not to give a retroactive effect to the enactment so as to alter the legal position of parties as to rights acquired in the past; but this rule ceases to have its effect when it becomes clearly the intention
168*a* of the legislature to give a retroactive effect to a law of this character. C. 1, 14, l. 7. The passage to which I refer ends with these very guarded words: "*Nisi nominatim et de præterito tempore et adhuc pendentibus negotiis cautum sit*"—that is, that the law must apply expressly to the bygone time and to pending transactions. It has been questioned whether this rule is binding even in countries where the Roman law forms the basis of the law (Savigny, Pte. Int. Law, by Guthrie, p. 293), and in several countries, to avoid

a doubt on this point, the non-retroactivity of the law is laid down as a fundamental principle of legislation. For instance, the art. 2 C. N. declares: "*La loi ne dispose que pour l'avenir; elle n'a point d'effet rétroactif,*" and so also in Prussia and Austria (Savigny, *id.*, p. 295). I think the rule is different in England, and that the doctrine of the Roman law is precisely that which governs us. Hardcastle, p. 95, and authorities there cited, establish this proposition fully. I need hardly say that the effect of a statute belongs to the public law, and therefore is governed by the principles of English public law. See also the power of legislation of Parliament contrasted with the powers of Congress. (Wade on Retroactive Laws, §§ 4 and 5.) As a general rule, in the United States laws divesting of vested rights are unconstitutional, and as a special instance of this it may be mentioned that void judicial proceedings cannot be validated.* What it is pretended was done, therefore, by the Dominion act in question, if attempted to be done by an act of Congress in the United States, would produce no legal effect, however plainly expressed. With us theoretically it is different. This is probably an error in principle in our constitutional law, but it is a curious evidence of the immense influence of the Roman law on the common law of England. The real principle, that which has governed the legislation of France, Austria, Prussia, and the United States, is laid down by a great writer in a work now little read: "If laws do not aim at the good of those that live under them they are laws only in name; in reality they cannot be laws." Dante, De Monarchia. Coke, who admits the general principle, is reported to have said that if there was a monstrous and absurd law he would not put it in force. Practically, however, the result is not very different in England from that of other nations. They do not interpret the rule against retroactivity so as to deprive an act of all kinds of retrospective effect; and we, while recognizing the doctrine of constitutional writers who exalt the powers of Parliament, permit the courts, by interpretation, so to read statutes that vested rights are not impaired. In Gairdner & Lucas, L. R., 3 App. cases, 603, Lord Blackburn seems to have stated the English rule shortly and correctly. He says: "Where the effect would be to make that valid which was previously invalid, to make an instrument which had no effect at all, and from which the party was at liberty to depart so long as he pleased, binding, I think the *prima facie* construction of the act is that it is not to be retrospective, and it would require strong reasons to show that it is not the case." This is pretty nearly the idea Coke meant to convey.

Now, what I think we have here to enquire is whether there are such strong reasons in the present case. In pursuing the enquiry I would first observe that if the pretension of appellants be correct the statute before us presents the most flagrant instance of an unjust law that could be imagined. It is not only a law passed to divest of a right, but of a right that had just been sanctioned by the

* See also Savigny, *id.*, p. 357. This shows how odious it was considered to touch a legal proceeding, terminated or not.

privy council. Now, without attaching more importance than it deserves to the fact that the decisions of the privy council take the form of a personal adjudication by the sovereign, still it seems hardly possible to conceive that the Queen, senate, and commons of Canada deliberately intended to ratify and confirm that which the Queen had, in the exercise of a constitutional and legal duty, declared to be invalid. Nor do I think the words necessarily imply such a construction. Parliament has ratified what the board did from and since the passing of the local act—that is, in all effects after the passing of the Dominion act, and therefore the act goes on to confirm the appointment of the board as it stood on the 17th of May, 1872. There is not a word about giving a new effect to pending transactions, as required by the rule of Justinian's code and as is required by all the English cases. Thus it was held that a
168*b* marriage contract made by parol, without writing, before the 24th of June, 1677, the day the statute of frauds came into force, could not be affected by that act, however general its terms were. Hardcastle, p. 196. Of course, a different rule would apply in the matter of a will executed, but not come into effect, and a statute affecting wills generally would affect such a will, for the reason given by the master of the rolls in Haslock & Pedley, L. R., 19 Ex., 273 (Hardcastle, 207).

I therefore think that the action was bad when it was brought, and that as the statute does not expressly interpret the previous law and set aside the judgment of the privy council in so many words, but contents itself with ratifying and confirming the acts of the board, as it must be supposed for the future we should reverse the judgment of the court below with costs. I stand, however, alone in this opinion, and the majority of the court, recognizing the statute in question as an *ex post facto* law, shows such alacrity in welcoming this legislation it will condemn the party who has been, by the court's own admission, in the right all the time to pay his own costs. I cannot, therefore, use the deferential form of saying I regret that I cannot concur in the judgment. Of course, this remark only applies to the question of costs. As to the interpretation of the act that is a matter open to discussion, but on the other point I intend my dissent to take the form of a protest. I may add that I am also glad to remark that the majority of the court is not agreed on this point, for I understand that Mr. Justice Tessier's opinion is that the appellants were not founded in their refusal to pay the respondent, even admitting that the board was constituted on an unconstitutional law. This is the only point raised by the factums of the parties, and I have already alluded to it shortly. If I had supposed it had seriously gained the acquiescence of one of the judges I should probably have dealt with it more in detail. At the same time I cannot retract or modify what I have said on that point. I am to reverse with costs.

Dorion, C. J., said that in 1875 two acts were passed in Ontario and Quebec to alter and amend the act which incorporated the repondents. The present board were elected under these acts. There was no other board existing under the original act. Therefore the

respondents were the only parties in possession of the property. The right of the local legislatures to amend the original act was challenged, but was maintained both in Ontario and Quebec. The privy council reversed that decision and declared that the local legislatures had no right to pass those acts. Since then an act has been passed by the Dominion Parliament confirming the authority of the board and ratifying their acts under the Quebec act. Two questions now arose—first, had the Dominion Legislature a right, constitutionally, to declare that this action was properly brought? and, secondly, if they have such right have they, in fact, so declared? It was a question of interpretation of the statute. Everywhere there is a supreme power which decides what is constitutional and what is not. In England it is the imperial Parliament which is supreme. When it has once decided in clear and emphatic terms no court of justice can touch the decision. In the United States the Supreme Court is the supreme power. Although the Supreme Court might give a bad judgment—one that everybody would admit to be bad, and which might have been rendered by a majority of one—yet, there is the limit of the Constitution, and what the majority holds is constitutional. The court has not to decide whether this is a moral law or not, but only whether the Dominion Parliament had a right to pass it or not. It is not enough to say that it trenches on private rights. The recent legislation on the Irish question trenches upon the rights of individuals; so our bankrupt laws trench upon the rights of creditors. We had an instance in the case of L'Union St. Jacques & Belisle, where parties who had a right to a fixed allowance were deprived of that right by the Legislature. The case went to England, and the privy counsel held that these parties could be deprived of their stipulated allowance by an act of the Legislature of Quebec. That was, no doubt, an act of the most arbitrary kind. There was a still more extraordinary case a good many years ago. Mr. Donegani came to this country with a son, who was at the time a few months old and had been born abroad. The father acquired considerable property and died without making a will. The son thought that he was entitled to all his father's property, but
169 the children of a younger brother, who were born in this country, came forward and claimed the whole estate. Very reluctantly the courts held that, under the then existing law respecting aliens, an alien was not entitled to take the property and it must all go to the nephews. The case went to the privy council, and there the judgment was confirmed because the son was an alien. Twice the privy council maintained that the nephews were entitled to the property, and then, in 1849 or 1850, after twenty years of litigation, the Legislature of the late Province of Canada passed an act relieving this young man from the disabilities of an alien, and gave him the property which would have been his by inheritance if he had been born six months later. All the costs were allowed out of the estate. In 1849 there were several good constitutional lawyers in Parliament; yet the statute was contrary to the decisions of the privy council. The present case did not approach the case of Donegani. There were also acts passed at Quebec on two occasions giv-

ing validity to the minutes of notaries who had died without having their deeds countersigned. These instances showed that the Dominion Parliament had the power to pass the act in question. The privy council, moreover, held that the Dominion Parliament had a right to deal with the question. The Dominion Parliament have dealt with it. The law is not so carefully worded as it might have been, but the court has to interpret it. His honor read the act and expressed the belief that it covered the present case. There was a question as to costs. Under the circumstances, the judgment would be maintained, with costs of the lower court, but each party would pay their own costs in appeal.

Baby, J., concurred entirely in the remarks of the chief justice.

Judgment confirmed, Ramsay, J., dissenting.

Macmaster, Hutchinson & Knapp, for appellants.

J. L. Morris, for respondents.

170 14.

Interference Decision, Bate Patent.

DEPARTMENT OF THE INTERIOR.

(Cut.)

UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, Greeting:

This is to certify that the annexed is a true copy from the records of this office of the decision of the examiner of interferences in the matter of the interference between the letters patent granted Ezekiel S. Halsted February 6th, 1877, number 187,008, and the application of John J. Bate, filed December 1st, 1876, and issued November 20th, 1877, for "improvement in the process of preserving meat during transportation, &c."

In testimony whereof I, M. V. Montgomery, Commissioner of Patents, have caused the seal of the Patent Office to be affixed this 4th day of January, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the one hundred and eleventh.

[Seal Patent Office.]

M. V. MONTGOMERY,
Commissioner.

171 "*Preserving Meats.*"

In the United States Patent Office.

In Re Interference HALSTED (Patent) *vs.* BATE.

Before the examiner of interferences.

The intervening subject-matter is as follows, viz:

"The process of preserving meat during storage and transporta-

tion by enveloping the same in a covering of fibrous or woven material and subjecting it when thus enveloped to the continuous action of a current of air of suitably low and regulated temperature."

It is fully set forth in Bate's claim and is involved in Halsted's patent, although not specifically claimed or fully described.

The issue is not who first invented the fibrous envelope nor who first invented the method of refrigerating meat by subjecting it to the action of a current of chilled air. The testimony shows that such an envelope and such a process, each by itself, is old and well known. It is urged by the counsel of Halsted that no invention is involved in putting meat wrapped in this well-known manner into this well-known refrigerator, and that such a process is not patentable; but the process in dispute involves a combination of both of these steps. The testimony shows that it is something more than a mere aggregation of the two results already separately obtained. Meat had been preserved by submitting it, in
172 refrigerators, to a current of chilled air of regulated temperature; but while being thus exposed it had not been wrapped in cloth and was liable to become discolored on its surface. So also an envelope of cloth had been used to protect meat from the dust and dirt, from being rubbed in handling, and from the injurious effect of the air while being transported, piled in bulk, or packed in small quantities in ice-boxes, through which, however, no regulated current of air was caused to circulate. For this purpose of protection it was not necessary that the envelope should be pervious to the air. On the other hand, in the process in controversy, in order to have the meat reach market with a bright and fresh appearance, it has been found requisite to have the air pass through the envelope and come in contact with the meat. This involves a different principle and one which, it does not appear, was ever before known or used. The process in dispute is, therefore, considered patentable, and there is no statutory bar to the grant of a patent to the party who is found to be the prior inventor of the same.

Halsted's patent is for a peculiarly formed envelope for beef quarters, which is not in controversy. As he intimates in his specification, it is a mere improvement in the envelope which had been previously used in the process now in dispute. He submits no testimony in regard to the date of invention of this process. In fact, he does not claim to have invented it. The greater portion of his testimony is produced in the endeavor to show that his adversary is not entitled to a patent. It relates principally to the envelope, which forms the subject of his patent, or to the old method
173 of transporting meat wrapped in cloth. As neither of these forms the issue, such testimony is immaterial and irrelevant. Furthermore, the testimony going to show that some third party, not a party to the suit, is the prior inventor of the process in dispute is inadmissible. (Bigelow *vs.* Commissioner of Patents, 7 O. G., 603; Smith *vs.* Perry *et al.*, 9 O. G., 688.) It appears, however, that Bate actually applied the process claimed in the transportation of

beef on the steamer "Wisconsin" before the date of the alleged suggestion of said process by Lippincott.

Bate shows conclusively that he was the first to invent and to introduce the whole process forming the interfering subject-matter, and priority is awarded accordingly.

Oct. 17th, 1877.

Z. F. WILBER,
Examiner of Interferences.

E. D. BOYD,
1*st Ass't Ex'r.*

174 15.

Petition to Dissolve Injunction in Bate Refrigerating Company v. Gillette et al.

U. S. Circuit Court, District of New Jersey. In Equity.

THE BATE REFRIGERATING COMPANY
against
B. W. GILLETTE *et al.*

Petition to dissolve.

To the honorable the judges of the circuit court of the United States in and for the district of New Jersey:

The petition of the defendants herein showeth as follows:

I.

That letters patent of the United States, No. 197,314, were granted to John J. Bate, of the city of Brooklyn, State of New York, November 20, 1877, for the term of seventeen years from that date, for "improvements in the process for preserving meats during transportation and storage;" that prior thereto and on the 9th day of January, 1877, letters patent of the Dominion of Canada, No. 6938, were granted to the said John J. Bate for the same invention or discovery for the term of five years from the said 9th day of January, 1877, and that the said term of five years for which the said Canadian letters patent, No. 6938, were granted expired January 9th, 1882.

175 II.

That the complainant herein, on the fifth day of February, 1878, filed its bill of complaint in this court against your petitioners, alleging infringement of the said letters patent, No. 197,314, of November 20th, 1877, and praying for an injunction and account; and thereafter, said cause having been heard upon the pleadings and proofs taken therein, a written opinion was, on the 13th day of September, 1881, filed by his honor Judge Nixon, sustaining the validity of the said letters patent and ordering the entry of an interlocutory decree for an accounting and injunction.

III.

That since the entering of the decree herein, on the 14th day of November, A. D. 1881, sustaining the validity of said letters patent of the United States, No. 197,314, and ordering an injunction to issue against the defendants herein, which injunction was subsequently issued and served, the said Canadian letters patent, No. 6938, have expired, to wit, on the 9th day of January, A. D. 1882; by reason whereof the said letters patent of the United States, No. 197,314, expired at the same time as the said Canadian letters patent, No. 6938, as provided for by section 4887, Revised Statutes.

IV.

That subsequent to the expiration of said Canadian patent, to wit, on the 29th day of May, 1882, your petitioners filed a petition herein setting forth the above-recited facts and praying for the dissolution of the said injunction; and thereupon said petition was, on the — day of ——, fully argued by counsel for the respective parties before his honor Judge Nixon, who thereafter and upon the 4th day of August, 1882, filed a written opinion, wherein it was held
176 that said letters patent No. 197,314 had expired on the said 9th day of January, 1882, and the prayer of the said petition to dissolve the said injunction was allowed and an order to that effect accordingly entered.

V.

That by the said opinion of his honor Judge Nixon it was determined by this honorable court, in the language of the said opinion:

* * * * * * *

"But the 15th section of the Canadian patent act, in force when the patent was issued to Bate, provides 'that an applicant shall also deliver to the commissioner, unless specially dispensed from so doing for some good reason, a neat working model of his invention on a convenient scale, exhibiting its several parts in due proportion, whenever the invention admits of such a model.'

"In this case the model was not dispensed with, but was required, and notice was sent to the solicitor of the inventor that the patent was withheld until it was furnished. It was not forwarded until the 18th of June, 1878, when the model reached the patent office in Canada, and on the 26th of the same month the letters patent were mailed to the solicitor. In the meantime the United States office had granted letters patent for seventeen years for the same invention, which bear date at the time of their issue, to wit, November 20, 1877.

"The case obviously turns upon the question whether the invention was patented in Canada previous to the issuing of the patent in the United States, in the sense in which the word patented is used in sec. 4887 of the Revised Statutes, the limitation of the statute being applicable only in such a case."

"The provisions of the section are as follows:

"'No person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared in-
177 valid by reason of its having been first patented or caused to be patented in a foreign country unless the same has been introduced into public use in the United States for more than two years prior to the application; but every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term, and in no case shall it be in force more than seventeen years.'

"The phraseology here used materially differs from the previous legislation on the subject. The power of the Commissioner of Patents is defined and abridged. Where a foreign patent has been granted for the same subject-matter he is expressly required to limit the term of the domestic patent to the period of time that the foreign patent has to run, or, if there be more than one, then to make it expire at the same time with the one having the shortest term. We do not see how any language could have been employed that would more clearly express the legislative design that the life of the domestic patent should expire with the term of any outstanding foreign patent.

* * * * * * *

"It was further insisted that the grant of the Canadian patent was to be determined not by its date or issue, but by the time of its delivery to the patentee; that, although dated January 9th and issued January 11th, 1877, it was not delivered until June 26th, 1878—a long time after the date of the American patent. Hence it was said 'the invention had not been previously patented in foreign country' when the patent was granted here.

"But this position will not stand the test of analysis or examination.

"It appears upon the face of the Canadian patent that it was granted and dated on the 9th and issued on the 11th of January, 1877, and was to continue in force for five years from its date.
178 By the 18th section of the Canadian patent act it is provided that 'every patent and instrument for the extension of time as aforesaid shall, before it is signed by the commissioner or any other member of the privy council, and before the seal hereinbefore mentioned is affixed to it, be examined by the minister of justice, who, if he finds it conformable to law, shall certify accordingly, and such patent or instrument may then be signed and the seal affixed thereto, and, being duly registered, shall avail to the grantee thereof.'

"The invention is patented so as to be available to the patentee when signed, sealed, and registered. Owing to the neglect of the inventor in not forwarding a model to the office, it was not delivered to him until June, 1878, but it was no less a patent, securing to him the benefits of the invention and protecting him against infringement. This becomes manifest by referring to section XVI of the

act, wherein it is enacted that 'the patentee shall have the exclusive right, privilege, and liberty of making, constructing, and using, and vending to others to use, the said invention for the period mentioned from the granting of the same.'

"Again, the proofs of the complainant show that the patent was absolutely granted as early as January, 1877, although the delivery was withheld owing to the laches of the grantee. The certificate of the assistant patent clerk of the Canadian office, the affidavit of Mr. Simpson, the solicitor employed by Mr. Bate to procure the letters patent, and the notice sent by the deputy commissioner all reveal upon their face that the requirements of the Canadian law had been fully met, and that the invention had been in fact patented before the model was required.

"It was further maintained by the learned counsel of the complainant that, even if it were conceded that the American patent should be construed to terminate with the Canadian patent, the extension of the latter under the provisions of the act operated to lengthen the term of the domestic patent to the period of fifteen years from the date of the first issue of the foreign patent.

179 "The XVII section of the Canadian law enacts that 'patents of invention issued by the patent office shall be valid for a period of five, ten, or fifteen years, at the option of the applicant, but at or before the expiration of the said five or ten years the holder thereof may obtain an extension of the patent for another period of five years, and after these second five years may again obtain a further extension for another period of five years, not in any case to exceed a total period of fifteen years in all.'

"By virtue of these provisions the inventor, Bate, exercised his option and first took out letters patent for five years. He afterwards procured extensions, first on December 12, 1881, for five years from January 9, 1882, and secondly on December 13, 1881, for another five years, to be computed from the expiration of the prior extension, to wit, from January 9th, 1887.

"What effect had these extensions on the life of the United States patent? Under the provisions of sec. 4887 must its term be made to expire with the term of the foreign patent in force when the letters patent were granted, or do these extensions of the foreign patent save the domestic patent from lapsing when the term ends which was running at the grant of the domestic patent?

"The question is an interesting one and has already received examination and answer in other circuits.

* * * * * * *

"We are clearly of the opinion that the prayer of the petition should be granted and the injunction be dissolved."

VI.

That thereafter the complainant herein and the said John Jones Bate, acting collusively in order to avoid the consequences of the judgment of this honorable court dissolving the injunction herein and with the view of defeating the ends of justice and perpetrating

a fraud upon this honorable court, determined to so proceed
180 in Canada as to have said Canadian patent No. 6938, of January 9th, 1877, declared null and void *ab initio* by a decree of a Canadian court of competent jurisdiction, and for that purpose borrowed the name of one Benjamin Holman, then of the city of Montreal, Canada, and in the name of the said Holman petitioned the Honorable J. A. Mosseau, then attorney general for the Province of Quebec, to bring an information for the issuing of a *scire facias* annulling the said Canadian patent; that the said attorney general, being ignorant of the said collusion and intended fraud, consented to lend his name, and that the writ of *scire facias* issued from the superior court of Lower Canada, district of Montreal, on the 27th day of September, 1882, against the said John J. Bate in his capacity of trustee for the Bate Refrigerating Company.

VII.

That the annulling of the said Canadian patent was prayed for upon the grounds that the said Bate had not, before his said Canadian patent was granted, deposited in the patent office a neat working model of his invention showing the several parts thereof, and had not obtained any dispensation from so doing under sec. 15 of the Canadian patent act of 1872. As stated in the declaration, "At the time when the said patent was granted and issued the said John Jones Bate had not complied with the conditions and formalities necessary to enable him to obtain a patent for said invention, and especially he did not deposit in the patent office a neat working model of the said invention showing the different parts thereof in due proportion.

"That the said John Jones Bate did not obtain from the commissioner of patents any dispensation from filing such model.

"That the said invention was capable of being easily represented by a neat working model.

"That the said commissioner of patents was not authorized
181 by any law to grant a patent to the said John Jones Bate for the said invention without compliance with said condition, and that the said grant so made was *ultra vires* of the said commissioner and null and void, and it ought to be now adjudged so, and that said patent did not confer any exclusive right to the said John Jones Bate to use said invention."

VIII.

That the said action was made returnable on the 10th day of October, 1882, and that the said Bate *es qualité* appeared by counsel and filed an affirmative plea to the said declaration, admitting and contending "that true it is the patent in this case was granted and issued, bearing date the ninth day of January, eighteen hundred and seventy-seven, and that no model of the invention was at that date deposited or filed in the office of the commissioner of patents, but defendant says that the conditions and formalities referred to in the patent, among others that requiring the filing of a model, are merely

directory and do not import nullity in case of breach, and tha moreover, the said defendant did, on the eighteenth day of Jun eighteen hundred and seventy-eight, in compliance with such de mand made upon him by the commissioner of patents to that effec file in the office of the said commissioner of patent a neat workin model of the said invention shewing all the parts thereof in du proportion.

"And defendant says that even if the said patent was not avail able at the date of its grant by reason of non-compliance with th said condition the said defect was cured by the subsequent filing o the said model, and the said patent became by such subsequen compliance a good and valid patent from the date of its issue, an in any event defendant says that even supposing said patent to hav been of no effect at the date of its issue in consequence of non-com pliance with the conditions, yet the subsequent compliance
182 with such conditions was effected to cure said defect an make said patent good and effectual from the date of such compliance, to wit, from the said eighteenth day of June, eighteen hundred and seventy-eight, and in fact said patent was not delivered and did not emanate until said model had been filed, and, although said patent bears a prior date, the result was that said model was considered as filed prior to said date."

IX.

That the defendant did not urge that he had been dispensed from filing a model before the granting of his said Canadian patent, as was the fact, and did not adduce any evidence to establish that fact as he would have done.

That, nevertheless, on the 1st day of December, 1882, said cause having been brought to trial before Hon. Justice Taschereau substantially upon the pleadings as above recited, and the court having heard the parties by their respective counsel, and upon due consideration thereof, judgment was rendered by the superior court in Montreal, dismissing the action upon two grounds:

"1st. Considering that 'the patent act of 1872' does not require, before a patent be granted and under pain of nullity of such patent, the production of a working model of the invention described therein, but that, on the contrary, it allows the commissioner of patents to dispense the application from so doing if said commissioner so thinks fit for some good reasons.

"Considering that the said commissioner exercises an absolute discretion and fulfills, in this respect, functions of a judiciary character, and that the justice and decency of his final decisions in a matter of this kind cannot therefore be questioned, especially when no reproach of fraud is made against him.

"Considering that the patent of invention in question in
183 this cause is a public document making *prima facie* proof of its contents and also of the regularity of all the proceedings anterior and subsequent to the grant.

"Considering that in the absence of any proof (and none has been made in the present case) the said patent of invention is pre-

sumed to have been granted in a legal and regular way, and the said commissioner is also presumed to have exercised his discretion so as to grant an exemption in conformity with the patent act of 1872, section 15.

"Considering that, inasmuch as the said commissioner had the right indefinitely to dispense the petitioner from the production of a working model, he had *à fortiori* the right to grant said dispensation for a limited time, reserving to himself the power to exact such production when he should think fit after the issue of the letters patent, which he appears to have done in the present case; that his decision in this respect is unassailable, and that the patent of invention is not void from the sole fact that the commissioner required the production of the working model after having exempted the applicant therefrom at the time of such issue."

2d. That the suit ought to have been brought by and in the name of the attorney general for the Dominion of Canada, and not by and in the name of the attorney general for the Province of Quebec.

X.

That thereafter said Bate Refrigerating Company and John Jones Bate, through the said Holman, caused an appeal to be taken from the said judgment, and that said appeal was heard before the superior court at Montreal, sitting as a court of review, where the said judgment was confirmed on the second ground as above stated, the court not adjudicating upon the first ground, it being unnecessary to a proper disposition of the case.

184

XI.

That thereafter the said Bate Refrigerating Company and the said John Jones Bate, still acting collusively and having the same fraudulent purposes in view and using the name of the said Holman, petitioned the attorney-general for the Dominion of Canada for authorization to use his name in the issuing of a new writ of *scire facias*, which authorization was granted, the said attorney general being ignorant of the said collusion and fraudulent purposes and intention, and likewise ignorant of the judgment of the superior court of Lower Canada in the case of Mousseau, attorney general, *vs.* John Jones Bate in his capacity of trustee for the Bate Refrigerating Company.

That thereafter a new writ was issued on the 20th day of April, 1883, from the superior court of Lower Canada, district of Montreal, against the said John Jones Bate in his capacity of trustee for the Bate Refrigerating Company.

XII.

That the annulling of the said Canadian patent was prayed for upon the same grounds as those urged in the suit of Mousseau, attorney general, *vs.* Bate, above referred to, the language of the declaration being: "That at the time when the said patent was granted and issued the said John Jones Bate had not complied with the condition and formalities necessary to enable him to obtain a patent for

said invention, and especially he did not deposit in the patent office a neat working model of the said invention showing the different parts thereof in due proportion.

"That the said John Jones Bate did not obtain from the commissioner of patents any dispensation from filing such model.

"That the said invention was capable of being easily represented by a neat working model.

185 "That the said commissioner of patents was not authorized by any law to grant a patent to the said John Jones Bate for the said invention without compliance with said condition, and the said grant so made was *ultra vires* of the said commissioner and null and void, and it ought to be now adjudged so, and that said patent did not confer any exclusive right to the said John Jones Bate to use said invention."

XIII.

That the said action was made returnable on the 1st day of May, 1883, and that the said Bate, *es qualité*, appeared by counsel and filed an affirmative plea to the said declaration, admitting that the said Bate had not delivered to the commissioner of patents a working model of his invention, and that the commissioner of patents had not granted him a dispensation from delivering or filing such a model, the language of the plea being "that true it is that the patent in this cause was granted and issued, bearing date the 9th day of January, eighteen hundred and seventy-seven, and that no model of the invention was at that date deposited or filed in the office of the commissioner of patents (and it is quite true that the commissioner of patents did not grant any particular or special dispensation from filing such model, nor was any such dispensation asked for by the applicant), but defendant says that the conditions and formalities referred to in the patent, among others that requiring the filing of a model, are merely directory and do not import nullity in case of a breach; and that, moreover, on or about the said eleventh day of January, eighteen hundred and seventy-seven, the said commissioner of patents, by letter addressed to C. C. C. Simpson, solicitor of patents, in Montreal, then acting for the applicant for such patent, demanded the production of the model, stating that the letters patent would not be delivered by them until such model should

186 be produced, and that afterwards the said defendant did, on the eighteenth day of June, eighteen hundred and seventy-eight, in compliance with such demand made upon him by the commissioner of patents to that effect, file in the office of the said commissioner of patents a neat working model of the said invention showing all the parts thereof in due proportion.

"And defendant says that even if the said patent was not available at the date of its grant by reason of non-compliance with the said condition, the said defect was cured by the subsequent filing of the said model, and the said patent became by such subsequent compliance a good and valid patent from the date of its issue, and, in any event, defendant says that even supposing said patent to have been of no effect at the date of issue in consequence of non-compli-

ance with conditions, yet the subsequent compliance with such conditions was effected to cure said defect and make said patent good and effectual from the date of such compliance, to avail from the said eighteenth day of June, eighteen hundred and seventy-eight, and in fact said patent was not delivered and did not emanate until said model had been filed, and, although said patent bears a prior date, the result was that the said model was considered as filed prior to said date."

XIV.

That thereafter and on the 9th day of July, 1883, said cause having been brought to trial before the Hon. Justice Torrance upon the pleadings and proofs as above recited, and the deposition of one witness, to wit, one Simpson, who acted as the solicitor for the said John Jones Bate in obtaining his said Canadian patent No. 6938, who was examined on the part of the complainants on the 5th day of June, 1883, testifying, "there was no dispensation from filing a model in the present case; no dispensation was asked by the
187 patentee," the defendants declining to cross-examine; and the court having heard the parties, by their respective counsel, and upon due consideration thereof, judgment was rendered by the superior court of the district of Montreal in favor of the complainants, and granting the relief asked for on the ground as stated in the judgment.

"Considering that by 35 Vic., cap. 26, sect. 15, of Canada the applicant for a patent shall deliver to the commissioner of patents referred to in said act, unless specially dispensed from so doing for some good reason, a neat working model; seeing that such model was not delivered till eighteen months after the issue of the patent in question in this cause, and that such delivery had not been dispensed with before such issue, doth overrule defendant's plea and grant the conclusions of the information in this cause filed, and doth in consequence declare that the patent of invention hereinafter described was improperly and illegally granted and issued and registered without jurisdiction and without authority, and that the same was and is *ab initio* null and void and insufficient to secure for the defendant any monopoly such as therein purports to be granted to him;" that the said Bate and the Bate Refrigerating Company having thereby accomplished their desired purpose and end by the foregoing fraudulent and collusive proceedings, no appeal was taken or caused to be taken by the said Bate from the said judgment of the said superior court of Canada.

XV.

That both of the said cases of Mousseau, attorney general, *vs.* Bate, and Campbell, attorney general, *vs.* Bate were not only instigated by the complainant herein, but were conducted, controlled, and manipulated throughout as it desired and to accomplish its end, and that the attorneys and counsel for both the complainant and

defendants in such proceedings were employed and paid for
188 by the complainant herein, and that the said Benjamin Holman had no interest whatsoever in the said proceedings other than lending his name to the complainant herein to enable it to accomplish its end.

XVI.

That the said last-mentioned judgment of the superior court of Canada, district of Montreal, was the direct result and consequence of the fraud and collusion of the said Bate Refrigerating Company, John Jones Bate, and Benjamin Holman, and that said action was instituted and controlled so as to obtain the said judgment annulling said Canadian patent void *ab initio* for the sole purpose of using and urging said judgment against your petitioners before this honorable court and to overcome and defeat the deliberate judgment of this honorable court dissolving the order for injunction herein as aforesaid.

That almost immediately thereafter, pursuant to their said object, the complainant herein moved in this honorable court to vacate the said order dissolving the injunction and to reinstate the same upon the grounds, among others, because the superior court for Lower Canada, in the Province of Quebec, on a *scire facias* issued by the attorney general (Sir Aiexander Campbell) in and for the Dominion of Canada, had declared that said letters patent issued on the 9th day of January, 1877, and the several extensions thereof were void *ab initio*, and had ordered the same to be canceled and annulled as illegally granted—that is to say, setting up and relying upon the said judgment of the superior court of Canada; that said motion to vacate was argued by counsel for the respective parties before his honor Judge Nixon, who thereafter and upon the 25th day of March, 1884, filed an opinion in writing vacating the former order dissolving the injunction and reinstating the injunction.

189 XVII.

That by the said opinion of his honor Judge Nixon it was determined by this honorable court, in the language of said opinion: "A motion has now been made and heard to vacate the order dissolving the injunction and to reinstate the same upon two grounds: (1.) Because the superior court for Lower Canada, in the Province of Quebec, on a *scire facias* issued by the attorney general (Sir Alexander Campbell) in and for the Dominion of Canada, had decided that said letters patent, No. 6938, issued to said Bate January 9th, 1877, and the several extensions thereof were void *ab initio*, and had ordered the same to be canceled and annulled as illegally granted. * * * It appears that the question has been raised in the Canadian courts in regards to the validity of the patent granted to Bate in Canada, the existence of which determined the life of his American patent. * * * We have before us the record of the final judgment of the court on the proceedings instituted by the attorney general, entered July 9, 1883, the material part of which is in these words: The court, having heard the parties upon the merits of the

cause, examined the proceedings and proof of record, heard the witness for plaintiff, and, having deliberated, * * * doth overrule defendant's plea and grant the conclusions of the information in this cause filed, and doth in consequence declare that the patent of invention hereinafter described was improperly and illegally granted and issued and registered without jurisdiction and without authority, and that the same was and is *ab initio* null and void and insufficient to secure for the defendant any monopoly such as therein purports to be granted to him; * * * and doth further cancel and annul *ab initio* said patent for invention and the renewals thereof and the transfer thereof and the registrations thereof, with costs," etc.

"It is the legal consequence of such a judgment that the
190 foreign patent never had, in fact, any existence, and that hence it can have no effect in shortening the term of the American patent. The latter stands for seventeen years as if no attempt had been made to take out the foreign letters. In this new state of facts the order dissolving the injunction must be vacated and the injunction restored to its former vigor and force unless the allegation of the defendants, that the judgment was obtained by collusion, deprives it of its legal effect. The charge of collusion arises from the fact that the patentee used the machinery, which was the only machinery accessible to him, to get before the court the question of the validity of his grant. The Canadian statute allows the writ of *scire facias* in the name of the attorney general of the Dominion, at the instance of any private person, to test the validity of letters patent issued by the sovereign to an inventor. A proceeding was first instituted by the attorney general of the Province of Quebec, but the court held that he was not the person contemplated in the act. A new writ was issued and the information filed by the attorney general of the Dominion. All the facts involved seem to have been fairly presented in the information and pleas, and the judgment of the court was the conclusion of the law upon the facts. The decision must be regarded as binding until set aside by proper proceedings. * * * Let an order be entered vacating the former order dissolving the injunction, and let the injunction be reinstated."

XVIII.

That thereupon your petitioners, being by the foregoing judgment of this honorable court affected and concluded in this court by the said judgment of the supreme court of Canada, and being advised that said judgment was the result of fraud and collusion on the part of the complainant and John Jones Bate, and that their
191 only relief was by proper proceedings in the superior court of Canada, proceeded to Canada, and there, by virtue of the privileges accorded to them under the laws of the Dominion of Canada and the practice of the said superior court of Canada, petitioned to and became parties to the said *scire facias* proceedings (Campbell *vs.* Bate), known as the tierce opposition, reciting in their said petition all the former proceedings as hereinbefore set forth, and that the judgment therein was the result of fraud and collusion,

and that your petitioners were affected and concluded by the judgment and without relief, save in the said superior court of Canada, and prayed the court (1) that the same (the judgment) be annulled, set aside, and declared null and void to all intents and legal purposes, and especially in so far as your petitioners are concerned; that the patent aforesaid granted to the said John Jones Bate on the ninth day of January, eighteen hundred and seventy-seven, be declared not to be null and void *ab initio*, but to have been granted legally and the said patent and the renewal thereof to be good and valid; that this court, proceeding to render the judgment which ought to have been rendered upon the said suit, do dismiss the said action; (2) that the parties in this cause be notified of this tierce opposition, and that they be called upon to appear and contest the same if they see fit, and, in default thereof, to hear the said tierce opposition declared good and valid; that by the judgment to be rendered in this suit the said tierce opposition be declared good and valid, and that it be adjudged that the judgment rendered in this cause on the ninth day of July, eighteen hundred and eighty-three, does affect the rights and interests of your petitioners; that it be declared that the said judgment was obtained collusively and fraudulently between Holman and John Jones Bates and the Bate Refrigerating Company with the intent of compromising and injuring the rights and interest of your petitioners; that it be declared that the said judgment could not have been obtained against the said John Jones Bate *es qualité* which he is given and he does assume in this suit; that it be declared that the judgment aforesaid is
192 contrary to law; that it be adjudged that the said patent of the ninth day of January, eighteen hundred and seventy-seven, was legally issued, and that the said patent and the renewals thereof be declared to have been obtained legally and to have been at the time of the institution of this action, at the time of the rendering of the aforesaid judgment of the ninth day of July, eighteen hundred and eighty-three, and to still be in full force, vigor, and effect; that the said judgment be henceforth annulled and set aside and be declared to be null and void and of no effect to all legal intents and purposes, and especially as to your petitioners, and that this court, proceeding to render the judgment which ought to have been rendered upon the said suit at law, do dismiss the same."

XIX.

That thereafter said petition or tierce opposition was made returnable, and both the Honorable Sir Alexander Campbell, attorney general, and the said John J. Bate appeared by counsel, being represented by the same counsel who had previously represented them in the said cause of Campbell, attorney general, *vs.* Bate, and took exceptions to the form of petition or tierce opposition filed in behalf of your petitioners, and for grounds of exceptions, amongst others, 6th, "because the pretended interest alleged is vague and uncertain and not arising out of any facts or laws existing in this country within the jurisdiction of this court, but is alleged to be

based upon facts and laws existing in a foreign country;" wherefore they prayed that the petition be dismissed and they be relieved from answering to the merits.

XX.

And thereafter the court, having heard the parties on the exceptions to the form of the petition or tierce opposition, did on the 30th day of June, 1884, render judgment: "Considering that the sixth allegation of said exception to form, to wit, that the
193 allegations of the tierce opposition are vague and uncertain, is ill-founded; on the contrary, the interests of the opposants as well as the rights which they claim by contesting the judgment rendered on the 9th day of July, 1883, are sufficiently set forth;" dismissing the said exceptions to the form of the petition or tierce opposition.

XXI.

That thereafter the said parties interposed a "defense in law" to the said petition or tierce opposition that "all, each, and every of the matters and things in the said tierce opposition contained are unfounded and insufficient in law to enable the said opposants to have or obtain the conclusion of their said opposition," and praying for a dismissal of the said petition.

That thereafter the court, having heard the parties on the merits of the defense in law, and after due consideration thereof, rendered judgment on the 30th day of December, 1884, as follows:

"Considering that by their opposition the opposants allege sufficiently the interest which it has to cause to be annulled the judgment rendered by the superior court of the district of Montreal on the ninth day of July, 1883, inasmuch as on proof made of this judgment before a tribunal of competent jurisdiction, in the United States, the said opposants allege that they have been deprived of the right of using the patent issued in the latter country under the name of 'Bate's improved system of ventilation, refrigeration, etc.,' a right which had been recognized by judgment of the ninth January, 1882; that if it is true that the judgment of July 9th, 1883, has been rendered by error and on false representations the opponents are interested to the extent that the proof thereof be made in order to be relieved from the said judgment of the 9th January, 1882;

"Considering that every person who suffers prejudice by a
194 judgment in which he has not been part or represented can cause the judgment to be vacated by way of the third opposition; that the right can be exercised by the opponents before the tribunals of this country, notwithstanding their quality of foreigners, the interests put in question by the said judgment of the ninth July, 1883, being allied to those which they possess by virtue of the patent which they have used in the United States, and of which they have been deprived as aforesaid:

"Dismiss the said defense in law with costs."

XXII.

That thereafter, on the 30th day of June, 1886, the said parties, to wit, the attorney general and John J. Bate, having answered to the merits of the said petition or tierce opposition, and the "court having heard the parties, by their respective counsel, upon the merits and issues joined on the tierce opposition filed to the final judgment rendered in the said cause on the 9th day of July, 1883, examined the proceedings and proof of record and evidence adduced, and on the whole deliberated," rendered judgment sustaining your petitioner's petition or tierce opposition and granting the relief therein prayed for.

That by the said judgment of the superior court of Canada it was determined by that honorable court, in the language of the judgment, Mr. Justice Gill delivering the opinion—

"That the present *tiers opposants* having infringed the said patent in the United States, a writ of injunction issued from the United States circuit court, district of New Jersey, at the instance of the Bate Refrigerating Company, was served upon them and sustained by decree entered November fourth, one thousand eight hundred and eighty-one, but subsequently, on petition presented on the twenty-ninth of May, one thousand eight hundred and eighty-two, the said injunction was dissolved on the ground that by the law of the United States the patent obtained there for seventeen years
195 had expired at the end of the time for which the Canadian patent previously taken out had been issued—that is to say, at the end of five years, reckoning from the ninth of January, one thousand eight hundred and seventy-seven; whereupon the said Bate Refrigerating Company and the said John Jones Bate, acting collusively with one Benjamin Holman, of Montreal, caused him to petition the attorney general for the Province of Quebec to have a writ of *scire facias* issued from this superior court against themselves, Bate & Bate Refrigerating Company, to annul the said Canadian patent, on the ground that a neat working model of said invention had not been deposited in the patent office at Ottawa before the said patent was granted, as required by law; and the said attorney general, unaware of the connivency between Holman and the present defendants, did allow his name to be used for the object in view; but both the superior court and the court of review having decided that the said attorney general for the Province of Quebec was not the officer at whose instance the said writ of *scire facias* should have issued, the said defendants, still acting in collusion with the same Benjamin Holman, had him petition the attorney general for the Dominion of Canada to be allowed to use his name under the conditions provided by law, in order that this present action and writ of *scire facias* might be brought before this court to have the said Canadian patent declared null and void *ab initio* for want of formality in the granting of it, as no model had been previously deposited.

That the said defendants filed an affirmative plea, admitting that the commissioner of patents had not granted the dispensation from filing such model. One witness was heard, but not cross-examined,

and the judgment now complained of followed, declaring the said Canadian patent null *ab initio* for want of model; that on the strength of the said judgment the defendants went back to the said circuit court for the district of New Jersey and obtained an order reinstating the injunction which had been dissolved as aforesaid and
196 prohibiting the present opposants to use the said invention.

Considering that the said *tiers opposants* who were not party to the suit, but whose interests suffer from the effects of said judgment rendered in this cause on the ninth of July, one thousand eight hundred and eighty-three, inasmuch as they have been deprived of the right of using said invention through the instrumentality of said judgment, are now entitled to be heard and to urge against it all legal grounds they may have, although their interest thereby affected may not be in this country, for their adversary having used against them in the United States the authority of the judgment and decision of this court, it is but justice to allow them to attack here—the only place where it can be attacked—the instrument so used elsewhere against them;

Considering it has been proved that all those legal proceedings have been had and the said judgment arrived at through the fraud to the law and collusion of the said John Jones Bate, Bate Refrigerating Company, and Benjamin Holman, deceiving the attorney general, the advocates, and the court, employing and paying counsel on both sides, as well, seemingly, against themselves as on their apparent behalf;

Considering that the deposit of a model of the invention to be patented is not according to our law a matter essential to the granting of the patent, but can be dispensed with at the discretion of the commissioner of patents; that the facts as they have occurred in this case—that is, preparing, drafting, and registering the patent before the model was deposited—would in themselves constitute a dispensation of model; but even that argument need not be resorted to, for it is now shown that the required model was in fact asked for and deposited before the patent was issued from the department and delivered to the patentee, although the patent or paper writing granting the patentee's petition had been prepared and signed beforehand—a practice proved to be customary in the department, and in fact not materially violating the law;

197 Considering the *tiers opposants* have served and filed their *tierce* opposition in due time, and delay after the judgment complained of was made known to them—doth declare the said tierce opposition good and valid, and, maintaining the same, doth revoke and annul the said judgment rendered in this cause on the ninth day of July, in the year one thousand eight hundred and eighty-three, as being contrary to the rights and interests of the said *tierce opposants*, as having been obtained collusively and fraudulently through the connivency of the said John Jones Bate, the Bate Refrigerating Company, and Holman, and as not having been rendered *en pleine connaissance decause*, but in the absence in the record of the whole facts as now shown, and in consequence thereof contrary to law; and it is further adjudged and declared

that the said patent of the ninth day of January, one thousand eight hundred and seventy-seven, was legally issued, and the said patent and the renewals thereof have been obtained legally, and, far from haing been null *ab initio*, the said patent has never ceased to be since the issuing thereof and is still in full force, vigor, and effect through the renewal of the twelfth of December, one thousand eight hundred and eighty-one, and as, moreover, declared by the statute of one thousand eight hundred and eighty-three (46 Vic., c. 19); and the said judgment, being henceforth annulled and set aside as aforesaid, is declared to be null and void and of no effect to all legal intents and purposes, and especially as regards the said *tiers opposants;* and the court, proceeding to render the judgment which ought to have been rendered, doth dismiss the said suit at law, writ, and proceedings with costs distraits."

XXIII.

That thereafter, in compliance with section 30 of the Canadian patent act of June 14, 1872, a certificate of the last-mentioned judgment of the superior court of Canada reversing and annulling
198 the former judgment of said court of the 9th day of July, 1883, was, on the 8th day of July, 1886, filed in the Patent Office at Ottawa, and thereupon the following entry was "entered on the margin of the enrollment of the patent in the office of the commissioner," to wit:

Certificate No. 2603, bearing date the 30th June, 1886, of the judgment of the superior court, Montreal, in the case of the Honorable Sir Alexander Campbell, plaintiff, *vs.* John Jones Bate, defendant, and The Cunard Steamship Co. and others, third opponents, and the Honorable John D. S. Thompson, plaintiff, *par reprise d'instance*, annulling the judgment rendered by the said superior court on the 9th day of July, 1883, with reference to patent No. 6938, and setting the said judgment aside and declaring the same to be null and void and of no effect, to all intents and purposes, and declaring that the patent in question is not void *ab initio*, has this day been filed in the patent office and this entry made on the margin of the said patent, in accordance with the 30th sec. of the patent act of 1872.

Patent office, Ottawa, 8th day of July, 1886.

(Signed) A. T. CAMBIE,
Act'g Deputy Com. of Pat's.

XXIV.

Wherefore your petitioners humbly pray, it having been determined by the judgment of the superior court of Canada of the 30th day of June, 1886, annulling and reversing the said former judgment of the said superior court of Canada of the 9th day of July, 1886, that the said Bate Canadian patent No. 6938 was not and is not null and void *ab initio;* that the order of this honorable court vacating the former order dissolving the injunction and reinstating

the injunction herein, which injunction is now in force and
199 effect, be dissolved, and for such other and further relief in the premises as to this honorable court shall seem meet.

And your petitioners will ever pray.

B. W. GILLETTE,
For Himself and the Other Petitioners.

JOHN R. BENNETT,
Counsel for Petitioners.

STATE OF NEW YORK, }
City and County of New York, } ss:

Benjamin W. Gillette, being duly sworn, deposes and says that he is one of the petitioners herein and one of the defendants in above cause; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated upon information, advice, and belief, and as to those matters he believes it to be true.

B. W. GILLETTE.

Subscribed and sworn to before me this — day of August, A. D. 1886.

GEORGE H. SONNEBORN,
Notary Public, N. Y. Co.

200 UNITED STATES OF AMERICA, }
District of Massachusetts, } ss:

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record of said circuit court in the cause in equity entitled Bate Refrigerating Company, complainant, *v.* George H. Hammond and Company, defendant, lately determined in said circuit court and of all proceedings therein.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at Boston, in said district, this fifth day of October, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the one hundred and twelfth.

[Seal of the Circuit Court, Massachusetts.]

JOHN G. STETSON, *Clerk.*

201 (*Bond to Party on Appeal.*)

Know all men by these presents that we, The Bate Refrigerating Company, a corporation duly organized under the laws of the State of New York, as principal, and Hubbard Breed and George S. Silsbee, both of Salem, in said State, as sureties, are held and firmly bound unto George H. Hammond and Company, a corporation duly organized under the laws of the State of New York, in the full and just sum of five hundred dollars, to be paid to the said George H.

Hammond and Company, its certain attorneys, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the thirtieth day of September, in the year of our Lord one thousand eight hundred and eighty-seven.

Whereas lately at a circuit court of the United States within and for the district of Massachusetts, in a suit in equity pending in said court between the said Bate Refrigerating Company, complainant, and the said George H. Hammond and Company, defendant, decree was rendered against the said complainant, and the said complainant having obtained an appeal to remove the said cause to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said defendant, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said complainant shall prosecute its said appeal to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

BATE REFRIGERATING COMPANY, [L. S.]
By JOHN J. BATE, *Pres't.*
HUBBARD BREED. [L. S.]
GEO. S. SILSBEE. [L. S.]

Signed, sealed, and delivered in presence of—
PAUL H. BATE.

Approved:
LE BARON B. COLT,
U. S. Circuit Judge.

A true copy of the bond taken by the judge at the time of allowing the appeal named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest: JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

Endorsed on cover: Massachusetts C. C. U. S. No. 862. The Bate Refrigerating Company, appellant, *vs.* George H. Hammond & Company. Filed October 17, 1887.

SUPREME COURT U.S.
FILED
DEC 15 1888
JAMES H. MCKENNEY
CLERK

United States Supreme Court.

THE BATE REFRIGERATING COMPANY,
Appellant,

vs.

GEORGE H. HAMMOND & CO.

BRIEF FOR APPELLANT.

R. S. SECTION 4887.

"No person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid by reason of its having been first patented, or caused to be patented in a foreign country, unless the same has been introduced into public use in the United States for more than two years prior to the application. But every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent, or if there be more than one, at the same time with the one having the shortest term, and in no case shall it be in force more than seventeen years."

WM. M. EVARTS,
RICHARD N. DYER.

JOHN LOWELL,
C. A. SEWARD,
Of Counsel.

NEW YORK:
DOUGLAS TAYLOR, LAW, BOOK AND JOB PRINTER, 89 NASSAU ST., COR. FULTON.
1888.

Hammond and Company, its certain attorneys, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the thirtieth day of September, in the year of our Lord one thousand eight hundred and eighty-seven.

Whereas lately at a circuit court of the United States within and for the district of Massachusetts, in a suit in equity pending in said court between the said Bate Refrigerating Company, complainant, and the said George H. Hammond and Company, defendant, decree was rendered against the said complainant, and the said complainant having obtained an appeal to remove the said cause to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said defendant, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said complainant shall prosecute its said appeal to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

BATE REFRIGERATING COMPANY, [L. S.]
By JOHN J. BATE, *Pres't.*
HUBBARD BREED. [L. S.]
GEO. S. SILSBEE. [L. S.]

Signed, sealed, and delivered in presence of—
PAUL H. BATE.

Approved:
LE BARON B. COLT,
U. S. Circuit Judge.

A true copy of the bond taken by the judge at the time of allowing the appeal named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest: JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

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WM. M. EVARTS,
RICHARD N. DYER.

JOHN LOWELL,
C. A. SEWARD,
Of Counsel.

NEW YORK:
DOUGLAS TAYLOR, LAW, BOOK AND JOB PRINTER, 89 NASSAU ST., COR. FULTON.

1888.

ACT OF 1836—SEC. 8.

Nothing in this act contained shall be construed to deprive an original and true inventor of the right to a patent for his invention, by reason of his having *previously* taken out Letter-Patent therefor in a foreign country, and the same having been published at any time within six months next preceding the filing of his specifications and drawings.

ACT OF 1839—SEC. 6.

That no person shall be debarred from receiving a patent for any invention or discovery * * * by reason of the same having been patented in a foreign country more than six months *prior* to his application: *Provided*, That the same shall not have been introduced into public and common use in the United States prior to the application for such patent: And *provided also*, That in all cases every such patent shall be limited to the term of fourteen years from the date or publication of such foreign Letters Patent.

ACT OF 1870—SEC. 25.

No person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid by reason of its having been first patented, or caused to be patented, in a foreign country; *provided*, the same shall not have been introduced into public use in the United States for more than two years prior to the application, and that the patent shall expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term; but in no case shall it be in force more than seventeen years.

REVISED STATUTES—SEC. 4887.

No person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid by reason of its having been first patented, or caused to be patented in a foreign country, unless the same has been introduced into public use in the United States for more than two years prior to the application. But every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent, or if there be more than one, at the same time with the one having the shortest term, and in no case shall it be in force more than seventeen years.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

THE BATE REFRIGERATING COMPANY,
Appellant.

against

GEORGE H. HAMMOND & Co.

No. 862.

THE CASE.

Bate, the plaintiff's assignor, on the first of December, 1876, filed an application in the United States Patent Office for a patent.

Such application was put into interference with a patent issued to one Halsted. Such interference was decided on the 17th day of October, 1877, in Bate's favor, and thereupon, and on the 20th of November, 1877, the patent in suit, No. 197,314, was issued to Bate.

On the 19th of December, 1876, eighteen days after the filing of the American application, Bate filed an application for a patent in Canada for improvements which included, as one feature, the process described in the American patent No. 197,314. The Canadian patent was issued on the 9th of January, 1877, for five years. Such patent was issued under Section 17 of the Canadian Patent Act of 1872 (p. 46), and it was extended on the 12th of December, 1881, for five years, and on the 13th of December, 1881, for a further period of five years.

On the 25th of May, 1883, the Canadian Parliament repealed said Section 17 and substituted therefor a new section which is printed in the record (p. 63).

By a stipulation between the parties (p. 15), it was agreed that the point taken in the answer of the defendant, that the patent on which this suit is brought expired on the 9th day of January, A. D. 1882, by reason of the prior grant to the said Bate of the Canadian patent for the same invention, should enure to the benefit of the defendant, as if the same had been pleaded, and that the defence so named should be submitted to the Court as on a plea set down for argument and upon the agreed state of facts to said stipulation annexed.

The Court below, therefore, passed only upon the question so submitted, as appears by the decree (p. 18), and in so doing, pronounced the following opinion:

"The questions raised under the stipulation in this case having recently been decided by Mr. Justice Bradley in favor of the defendants in a suit by this complainant *vs.* Gillett and others, in the Circuit Court for the District of New Jersey, and both parties desiring to appeal the case to the next term of the Supreme Court, a decree may be entered sustaining defendant's plea and dismissing the bill."

ASSIGNMENT OF ERRORS.

The Court below erred:

1st. In dismissing the bill.

2d. In holding that the Canadian patent had any effect whatever upon the patent in suit.

3d. In holding that the patent in suit was limited in its duration to the five years specified in the Canadian patent.

4th. In finding as matter of fact that the Canadian patent had expired.

5th. In holding as matter of law that the Canadian patent had expired.

6th. In holding that the duration of the Canadian patent was not for fifteen years.

7th. In refusing to hold that the provisions of Section 4887 of the Revised Statutes were not applicable to the patent in suit by reason of the fact that the application therefor was duly filed before the application for the Canadian patent was filed and before the Canadian patent was issued.

8th. In refusing to hold that the patent in suit is now in full force and being.

9th. In sustaining the plea.

ARGUMENT.

In support of this assignment of errors the plaintiff submits the following argument:

What is the Correct Construction of Section 4887 of the United States Revised Statutes?

That the correct construction of Section 4887 is not clear is conceded by Mr. Justice BRADLEY in Bate Refrigerating Co. *vs.* Gillett (31 Fed. Rep., 814), in this language:

"With regard to the construction of our own statute (§ 4887 of the Rev. Stats.), if the question were an open one I might have some hesitation, but as it is at least a question of considerable doubt, I feel constrained, sitting at the circuit, to follow the law of the causes

held by Judge NIXON, especially as his judgment has been followed in other circuits. * * * In any case a Judge will be very reluctant to decide the law adversely from what has previously been decided in the same case, either by himself or by another Judge, although it has sometimes been done, especially for the purpose of conforming to a decision of an appellate court. But where no such decision has been made and where the question, to say the least, is a doubtful one, it would be very unseemly for one Judge to overrule the decisions of another in the same case. Therefore, without having come to any decided conclusion upon the question in hand considered as an original one, I feel bound to follow the previous ruling of this Court, confirmed as they are by those of other Circuit Courts as safe precedents until the law shall be differently settled by the appellate tribunal."

This opinion was delivered by Mr. Justice BRADLEY in a case which had been previously before Judge NIXON, and is reported in 13 Fed. Rep., 553.

The decision of Judge NIXON was adopted by Mr. Justice BLATCHFORD in Gramme Co. *vs.* Arnoux (17 Fed. Rep., 840) in these words:

"The meaning of Section 25 of the Act of 1870 is that the United States Patent shall expire at the same time with the foreign patent having the shortest time to run, which was granted before the United States patent was granted, and not that it shall expire at the same time with the foreign patent having the shortest time to run which was granted before the time when the application for the United States patent was made."

The decision of Judge NIXON was based upon Section 4887 of the Revised Statutes. The decision of Mr. Justice BLATCHFORD was based upon Section 25 of the Act of July 8, 1870.

Moreover, as Mr. Justice BRADLEY, in the same case in which Judge NIXON pronounced his opinion and having that opinion before him, said:

"With regard to the construction of our own statute it is at least a question of considerable doubt,"

and that he has not

"come to any decided conclusion on the question in hand considered as an original one"—

the question involved seems to be such an one as is described in the opinion of this Court in Andrews *vs.* Hovey (124 U. S., 716), in which Mr. Justice BLATCHFORD said:

"A question arising in regard to the construction of the statute of the United States concerning patents for inventions cannot be regarded as judicially settled when it has not been so settled by the highest judicial authority which can pass upon the question. * * * No question arising in any such case, reviewable by this Court, can be regarded as finally settled, so as to establish the law for like cases, until it has been determined by this Court."

For the proper understanding of the intent and legal effect of Section 4887 of the Revised Statutes a brief resume, of the Patent Laws of the United States may be of service.

The original Patent Act of April 10, 1790, authorized the issuance of Letters Patent to any person, or his assigns, "for any term not exceeding fourteen years." But it was required that the invention should not have "been before known or used" presumably anywhere at home or abroad.

This Act of 1790 was repealed by the Act of February 21, 1793, which gave a right to a patent for an invention "not known or used before the application" to a citizen, or his assigns, for a term not exceeding fourteen years. The inventor was required to allege that his invention was not known or used before the application. Statutory defenses were created, but the existence of a foreign patent for the same invention was not specified as a ground of defense. So that it resulted that, under the Act of 1793, an American citizen had a right to obtain a patent abroad if he could, and the existence of such a patent, whether before or after the American patent, was not made by law a ground of defense. But the existence of a foreign patent to an American inventor before his application at home absolutely precluded him from bringing his application within the requirements of the act, that the invention "was not known before the application."

The Act of April 17th, 1800, extended the benefits of the Act of February 21st, 1793,

> "To all aliens who, at the time of petitioning in the manner prescribed by the said act, shall have resided for two years within the United States; * * * provided that every person petitioning for a patent for any invention pursuant to this act shall make oath or affirmation that such invention hath not, to the best of his or her knowledge or belief, been known or used, either in this or in any foreign country; and every patent which shall be obtained pursuant to this act for any invention, art or discovery, which it shall afterwards appear had been known or used previous to such application for a patent, shall be utterly void."

This section was early construed. In 1820 one Duplat, an alien, who had resided within the United States for two years, applied for a patent for a discovery of which he was the original inventor, but which he put into extensive operation in France before he came to the United States. The Attorney-General (1 Opinions of Attorneys-General, 333), Mr. Wirt, held that Duplat could not take the oath required by law; that the law was imperative; and that by reason of Duplat's inability to take the oath he was not entitled to a patent.

The result of this was, therefore, that an alien patentee, by the very fact of his foreign patent, barred himself from a right to an American patent, because, from the very signification of the word "patent," the invention was known in the foreign country in which the foreign patent was taken out.

The private acts of Congress show that this requirement of residence was waived by Congress in favor of alien inventors whenever the value of the invention was deemed sufficient to justify such waiver, and thereby Congress asserted its power to interfere with the inchoate right of American citizens to use here an invention made abroad.

The Act of July 13th, 1832, removed the necessity for the two years residence by an alien, provided the alien had at the time of the petitioning declared his intention, according to law, to become a citizen of the United States. but left him in other respects like the alien under the Act of April 17th, 1800, debarred from the right to obtain an American patent, if the invention had been previously known or patented abroad—as an American inventor was similarly

debarred if he had taken out a foreign patent before his application for an American patent.

Section 6 of the Act of July 4, 1836, authorized a patent to be issued to any inventor; and Section 7 imposed upon the Commissioner and for the first time the duty of the filing of the application, and the further duty to examine the same (1) and on such examination

"If it should not appear to the Commissioner that the same had been invented or discovered by any other person in this country prior to the alleged invention or discovery thereof by the applicant or (2) that it had been patented or described in any printed publication in this or any foreign country, or (3) had been in public use or on sale with the applicant's consent or allowance prior to his application * * * to issue a patent therefor."

This section confirmed the preceding legislation by which the issuance of the foreign patent before the American application debarred the alien and home inventor and invalidated their patents as before noted. That it might have this effect is shown by Sec. 8, which would not have been necessary unless the foreign patent did constitute such a bar.

Section 8 provided that

"Nothing in this act contained shall be construed to deprive an original and true inventor of the right to a patent for his invention, by reason of his having *previously* taken out letters patent therefor in a foreign country, and the same having been published at any time within six months next preceding the filing of his specifications and drawings."

This section seems to have prevented the Commissioner from refusing an American patent unless the foreign patent had previously been taken out, and also published within six months next preceding the filing of the American specifications and drawings—and thus removed as a possible ground of disbarment and invalidity the mere taking out of a foreign patent. This section, however, did not limit the life of the American patent to the expiracy of the foreign patent.

The Act of March 13th, 1839, provided in its sixth section as follows:

"That no person shall be debarred from receiving a patent for any invention or discovery * * * by reason of the same having been patented in a foreign country more than six months *prior* to his application, provided that the same shall not have been introduced into public and common use in the United States prior to the application for such patent, and provided also that in all cases every such patent shall be limited to the term of fourteen years from the date or publication of such foreign letters patent."

This act did not provide when an American patent should expire when there were several foreign patents having a different number of years to run.

It would seem to result therefore, from this resumé of the law (1) that a foreign patent, in order to defeat an American patent, must have been taken out abroad prior to the application for the American patent, and (2) that after the passage of the Act of 1839 the six months' limitation of Section 8 of the Act of 1836 became of no consequence unless the invention so patented abroad had been introduced into public and common use in the United States prior to the application for the American patent.

The Act of March 2d, 1861, provided that all patents thereafter granted should remain in force for the term of seventeen years from the date of issue.

Decisions under the Patent Acts prior to 1870.

In French *vs.* Rogers (1 Fisher Pat. Cas., 134), the head note reads as follows:

"The provisions of Section 8 of the Act of 1836 and of Section 6 of the Act of 1839, as to when a home patent shall bear the date of a foreign patent, relate only to such patents as are applied for here, after the issue of the foreign patent. Where, therefore, an application for a foreign patent was made in this country in April, 1838, and acted on in that month, but a patent was not actually issued until June 20th, 1840, at which time the patent was dated, and a foreign patent was obtained in August, 1838; *held*, as the application here was before the foreign patent, that the grant of the patent here was under the general enactment of the Act of 1836, and its term was properly from its date."

In Globe Company *vs.* Superior Company (27 Fed. Rep. 450), the Court adopted substantially the same rule—that the rights of the American inventor must be decided as of the date of the home application.

In Matthews *vs.* Wade (1 McArthur, 159), the Court used this language:

"As to the eighth reason of appeal, I doubt whether the English and French patents obtained by Wade, or for his benefit, even if obtained more than six months before Matthews' application, would be good cause for reversing the decision of the Commissioner in favor of Matthews, if he was the first inventor. But it appears by the proceedings in the office that the first application of Matthews was on the 12th of May, 1848. The English patent obtained by Wade was in July, 1848, and although Matthews' first application was withdrawn, yet it was instantly renewed in the same words, and must be considered as continuing the application, so that six months had not expired after the English and French patents were issued, before the Matthews application; but it seems that the foreign patents must be issued before the American discovery."

The same ruling was made in Goodyear Dental Co. *vs.* Willis (1 Flippin, 404), the Court adding:

"This disposition of the objection of forfeiture renders unnecessary what we should otherwise deem it proper to say—that in order to support that part of it resting upon the issuance of a foreign patent, proof should be given connecting the complainant with its procuration."

In Kendrick *vs.* Emmons (9 O. G., 201), the Court said:

"The English patent was not sealed previous to June 15th, 1854. It was taken out surreptitiously by some one who, without the knowledge of the American inventor, and without authority from him, endeavored to appropriate the benefits of his invention. If a person had thus surreptitiously taken out letters patent in this country for the invention of another who was diligently perfecting his invention, he would not thereby have deprived the real inventor of any rights. It is not believed that by taking out in advance an English patent he could have accomplished more than he could have done by taking out letters patent in this country. The effect of the provision in the Act of 1839, with reference to the effect of his invention having been patented in a foreign country more than six months prior to his application, evidently refers to the fact of its having been patented by him, the applicant for the American patent."

In Gold Co. *vs.* Commercial Co. (23 Fed. Rep., 343), the Court said:

"I am not aware that it has been supposed that the sixth section of the Act of 1839 related to patents which were issued by the United States before an English patent had been sealed and published. In this case the English patent was sealed five months after the patent in suit was issued; and although the English patent was, when published, dated March 16th, 1868, I do not suppose that such date has any effect upon the right of the subsequently issued letters patent. It will also be noticed that the application for the United States patent was made before the provisional specification was filed in the office of the

English Commissioner of Patents. The decision of Judge Grier and of Judge Kane, in French *vs.* Rogers, was to the effect that a United States patent, issued after the issuance of an English patent, but applied for before the date of the application for the English patent, was not within the sixth section of the Act of 1839, but the point was left undecided by the Supreme Court in O'Reilly *vs* Morse (15 Howard, 62)."

In Corning *vs.* Burden (15 How., 270), this Court said:

"But the Act of 4th July, 1836, introduced a new system, and an entire change in the mode of granting patents. * * * * On the filing of an application, the commissioner is required to make or cause to be made an examination of the alleged invention, in order to ascertain whether the same had been invented or discovered by any other person in this country prior to the application, or whether it had been patented in this or any foreign country or had been in public use or sale withthe applicant's consent prior to his application; and, if the commissioner shall find that the invention is either useful or important, he is authorized to grant a patent for the same."

The Act of 1870 and Section 4887 of the Revised Statutes.

The law remained in this condition until the Act of 1870. Section 25 of that act took the place of the previous provisions of the law as to all subsequent patents, and as it was virtually subsequently incorporated in the Revised Statutes the two sections are here printed in parallel columns:

ACT OF 1870—SEC. 25.	REVISED STATUTES—SEC. 4887.
No person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid by reason of its having been first patented, or caused to be patented, in a foreign country; *provided*, the same shall not have been introduced into public use in the United States for more than two years prior to the application, and that the patent shall expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term; but in no case shall it be in force more than seventeen years.	No person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid by reason of its having been first patented, or caused to be patented, in a foreign country, unless the same has been introduced into public use in the United States for more than two years prior to the application. But every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent, or if there be more than one, at the same time with the one having the shortest term, and in no case shall it be in force more than seventeen years.

On the argument before Mr. Justice BRADLEY he used this language when speaking of this section of the Revised Statutes:

"Now, suppose you alter the punctuation and put a semi-colon instead of a period there and read on: 'But every patent granted for an invention which has been previously granted.' Previous to what? Mr. Bennett: Previous to the first patent. The Court: It does not say so. You have to exercise your judgment as to what it refers to, whether it refers to the application mentioned or refers to the granting of the patent." (Stenographer's Minutes, p. 348.)

* * * * * * * * * * * *

The great trouble with the section is the evident attempt of the compilers or revisers to abridge the language—to shorten the words of the enactment, and, in so doing, they have introduced a great deal of uncertainty. Now look at this: "No person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid by reason of its having been first patented, or caused to be patented, in a foreign country." See how very general that is. "First patented." First patented before what?

It is so general that no one can read it without seeing that it is at least doubtful as to what it does refer to. There is the difficulty of the whole thing. The generality has introduced ambiguity." (Stenographer's Minutes, pp. 349, 350.)

The revisers in their report reported Section 4887 precisely as it now reads, and then added in a marginal note these words:

"Patents for inventions previously obtained abroad 8 July, 1870, Ch. 230, § 25."

And the same words are to be found opposite Section 4887, proving that Section 4887 was founded by the revisers on Section 25 of the Act of 1870.

The original Section 25 of the Act of 1870 is quite as clearly traceable to the Act of 1839 as Section 4887 is traceable to Section 25 of the Act of 1870.

The Act of 1839 states upon its face that the date of the application is the controlling one.

The Courts asserted that under this statute subsequent foreign patents did not limit the life of a previously applied for American patent, and that Act of 1839 and those decisions were before those who drew the revision of the Act of 1870, and it is not to be presumed that there was any intention to make the Act of 1870 less beneficial to the American citizen than the Act of 1839, or to establish a different date from which the right of such citizens attached from that which had been prescribed by the Act of 1839.

There is no ambiguity possible about the Act of 1839. Its language is:

"And provided also that in all cases every such patent shall be limited to the term of fourteen years from the date or publication of such foreign patent."

That is, limited to the term of a patent issued or published

"in a foreign country more than six months prior to the application."

The use of the word "such" in the Act of 1839 designates the foreign patent as one which had been taken out more than six months prior to the application.

In the Act of 1870 the word "such" is eliminated and the word "the" is substituted therefor. This word "the" is carried forward in Section 4887, and the inquiry, therefore, is whether the substitution of the definite article "the" for the word "such" in the Act of 1839 was an intentional change of purpose, and was designed to prevent an American inventor from receiving the benefit of his American application, which had been conferred upon him by the Act of 1839.

The change of phraseology between the Act of 1870 and the Act of 1839 is hereby shown:

(Section 6 Act of 1839) And be it further enacted:
(Section 25 Act of 1870) And be it further enacted:

That no person shall be debarred from receiving a patent.
That no person shall be debarred from receiving a patent.

for any invention or discovery, as provided in the act approved
for his invention or discovery.

on the fourth day of July, one thousand eight hundred and thirty-six

to which this is additional, by reason of the same having been
nor shall any patent be declared invalid.
by reason of its having been first

patented in a foreign country more than six months prior to his
patented
or caused to be
patented in a foreign country;

application : Provided, that the same shall not have been introduced
provided the same shall not have been introduced

into public and common use in the United States, prior to the
into public use in the United States,
for more than two years prior to the

application for such patent : And provided also, That in all
application

and that the

cases every such patent shall be limited to the term of
patent shall expire at the same time with *the* foreign patent,
or, if there be more than one, at the same time with *the* one

fourteen years from the date or publication of *such* foreign
having the shortest term . but in no case shall it be in

letters-patent
force more than seventeen years

Both the 25th Section, Act of 1870, and Section 4887, make the date of the application a pivotal date for some purpose, *i. e.*, that the foreign patent must not have been introduced into public use in the United States for more than two years prior to the application—thus giving the American inventors the benefit of that date for that specific purpose, as in the Act of 1836, six months has been established for a like purpose. Did Congress intend to take away the benefit of that date in the subsequent provisions of the Act of 1870 and Section 4887?

Inasmuch as both statutes made the application the controlling date as to the period of public use which will not debar, as "two years," as contradistinguished from any "public use" which did debar under the Act of 1839, is it not to be presumed that the foreign patent, which is to abridge the American patent, must in turn be subject to the same controlling date, or, in other words, that "the" of 1870 is the "such" of 1839? and means the foreign patent issued prior to the American application.

The origin and meaning of the word "debarred," in its application to foreign patents.

Under all the statutes previous to that of 1870, the line was drawn as between an inventor and his right to an American patent at the date of his application. Nothing which occurred subsequently thereto could injure such applicant. That which occurred previously to his application could alone deprive him of his right to a patent.

Thus, in the Act of 1793, the inventor was required to allege that

his invention was not known before the application. If it had been patented abroad previously to the application, then, of course, by the very signification of the word "patent," it had been made known prior to the application, and therefore the application was defeated.

The Act of 1800 provided that every person petitioning—*i. e.*, making an application—shall make oath that his invention had not been known in any foreign country. So that the taking out of a patent abroad prior to such petitioning prevented the issuance of the American patent.

The Seventh Section of the Act of 1836 prevented the issuance of a patent after the filing of an application therefor, if it appeared to the Commissioner "that it had been patented in any foreign country," that is, had been patented prior to the time when the duties of the Commissioner commenced, *i. e.*, on the filing of the application.

The date of the application has been judicially decided to be *prima facie* the date of the invention (Wing *vs.* Richardson, 2 Fish., 536; Jones *vs.* Sewell, 6 Fish., 658; Dana *vs.* Chicago Mfg. Co., 2 O. G., 677; Packard *vs.* Sandford, 16 O. G., 1182; Allen *vs.* City of New York, 17 O. G., 1281).

Neither the rights of the applicant nor the duty of the Commissioner were controlled by the fact that the foreign patent might have been taken out by the American applicant, or by the fact that such foreign patent, if taken out by another, was subsequent to the date of the American invention. These two circumstances were not authorized to be taken into consideration either for or against the applicant by the provisions of Section 7.

This hardship was, to a certain extent, ameliorated, so far as the previous foreign patents to an American inventor was concerned, by Section 8, which provided that—

"Nothing in this act contained shall be construed to deprive an original or true inventor of the right to a patent for his invention by reason of his having previously taken out letters patent therefor in a foreign country, and the same having been published at any time within six months next preceding the filing of his specifications and drawings,"

thus conferring upon the American inventor the right to an American patent, notwithstanding he had previously taken out foreign letters patent, unless such foreign letters patent had been taken out more than six months next preceding the filing of his American specifications and drawings.

It is clear, therefore, that the taking out of such foreign letters patent subsequently to the filing of his specifications and drawings, had no effect of any kind upon the American patent, nor did such taking out have any such effect, even within six months before the filing of the American specifications and drawings, unless such foreign patents had been "published"—that is, printed and distributed in the ordinary acceptation of the term. The language is:

"That nothing in this act contained shall be construed to *deprive* an original and true inventor of the right to a patent by reason of his having previously taken out letters patent therefor in a foreign country, and the same having been published," &c.

"Deprive" is a synonym for "debar," and that "debar" had its origin in the Act of 1836, and it was there stated that the fact that an American inventor had previously taken out a foreign patent, less than six months next preceding the filing of his specifications and drawings, should not *debar* him from his right to an American patent. In other words, this section removed the bar arising from his having previously taken out a foreign patent, which was created by the previous sections, and that bar, as has already been said, was a bar existing at the time of the application, and not a bar arising subsequently thereto.

The Act of March 13, 1839, was an act in addition to the Act of 1836, and used these words:

"That no person shall be *debarred* from receiving a patent by reason of the same having been patented in a foreign country more than six months prior to his application, provided that the same shall not have been introduced into public and common use into the United States prior to the application for such patent."

There are two changes of phraseology in this Act of 1839 to be noticed:

1. That the synonym "debar" takes the place of the word "deprive," as used in the Act of 1836.

2. That the *debarment* which, under the Act of 1836, was not to *deprive* an original and true inventor of "the right to a patent for his invention" is in the Act of 1839 not to deprive the inventor "from receiving a patent," which right to a patent or to receive a patent as between the inventor and the Government was perfected by the application and existed immediately on its filing.

The practical effect of this Act of 1839 was to remove the six months limitation of Section 8 of the Act of 1836, and it became of no consequence unless the invention so patented abroad had been introduced into public and common use in the United States prior to the application. But the term of the American patent issued under this Act of 1839 was to run for fourteen years from the date of publication of the foreign letters patent.

The Act of 1870, as well as the Revised Statutes, uses this form of expression:

"No person shall be debarred from receiving a patent for his invention or discovery nor shall any patent be declared invalid," &c.

There is the same word "debarred," which the Acts of 1836 and 1839 had made familiar, and it was used with reference to the same subject matter, that is, with reference to the effect of a previous foreign patent, not previous to a patent issued in this country, but previous to the time when the American inventor applied for his patent.

Under the Act of 1870, as between the American inventor and the Government, the date of invention was *prima facie* the date of the application, and, therefore, when the examination in the Patent Office disclosed a previous foreign patent—that is, previous to that application—such foreign patent was *prima facie* a bar, under Section 24 of the Act of 1870, to the right to receive the patent

applied for, which restricted the right to receive a patent to such an invention as had not already been patented in a foreign country. It was therefore to overcome precisely the bar established in 1836, re-enacted in 1839, and carried forward in 1870, that Section 25 of the Act of 1870 was adopted.

This Court, through Mr. Justice BRADLEY, in the case of Siemens *vs.* Sellers (123 U. S., p. 284), said :

"By the same act (Section 7) if an invention for which a patent was sought had been patented in a foreign country before the application for a patent here, it was a bar to obtain ng a patent in this country, unless (Section 8) such foreign letters patent had been taken out by the applicant himself within six months previous to the filing of a specification and drawings. The Act of 1839 (Section 6) removed the limitation of six months, and allowed a patent to be taken out here at any time after the inventor had taken out a patent for the same invention in a foreign country provided it should not have been intr oduced into public and common use in the United States prior to the application for a patent here. * * * The Act of 1870 was a revision of all previous laws relating to patents, continued the period of seventeen years as the term of a patent, and in case a patent had been previously issued, declared that the American patent should expire at the same time with the foreign patent. * * * This provision is substantially carried forward into the Revised Statutes (Section 4887)."

This decision of the Supreme Court establishes three things for which the plaintiff now contends :

1. That the "bars" under the Acts of 1836 and 1839 were foreign patents existing prior to the American application ;

2. That the Act of 1870 was a revision of the previous laws, so far as these provisions are concerned; and

3. That Section 4887, of the Revised Statutes, and Section 25, of the Act of 1870, are as to these provisions substantially the same.

This section, the same as the Act of 1839, removes a bar which under other sections of the Act might exist and allows the grant of a patent but limits the life of the patent so granted to the life of the foreign patent. But, as we have shown, the bar must have been one existing at the time of the application and consequently the section has no reference to applications as to which there was no bar to a patent at the time of their filing.

O'Reilly vs. Morse.

The Revisers' notes to Section 4887, call attention in a side note to the case of O'Reilly *vs.* Morse (15 How., 62) as having a bearing upon the interpretation to be given by the law officers and the profession to the provisions of Section 4887, and therefore seems at least to suggest for the guidance of both that the decision in that case had a bearing on the proper interpretation of the section to which the reference was affixed.

The synopsis of that case may be stated as follows :

A French patent was granted to Professor Morse, October 30, 1838, which was dated August 20, 1838, and required him to put his invention into use within two years, or the patent would be forfeited. Morse did not so put his invention into use.

On the 7th of April, 1838, Morse filed his American petition and specifications. The Commissioner asked for duplicate drawings.

Morse asked, May 15, 1838, for a delay in issuing a patent until he had returned from Europe, "as I fear issuing them here will at present interfere with my plans abroad."

The American patent was issued to Morse, June 20, 1840.

The Circuit Court said:

"The exclusive right of the complainant in respect of his original invention is limited by this foreign patent to the term of fourteen years from its date."

The Supreme Court said:

"Nor is it void because it does not bear the same date with the French patent. It is not necessary to enquire whether the application of Professor Morse to the Patent Office in 1838, before he went to France, does or does not exempt his patent from the operation of the Act of Congress on the subject, for if it should be decided that it does not exempt it, the full effect of that decision would be to limit the monopoly to fourteen years from the date of the French patent. In either case, the patent was in full force at the time the injunction was granted by the Circuit Court, and when the present bill stood regularly for hearing in this Court."

Mr. Justice Grier, in his individual opinion, said:

"Does the complainant's first patent come within the proviso of the 6th section of the Act of 1839? And should the term of fourteen years granted by it commence from the date of his patent here or the date of his French patent in 1838?

"I am of opinion that the patent in question does not come within this proviso.

"On the 9th of April, 1838, he filed a formal application for a patent, accompanied by a specification and drawings. On the first of May, 1838, the Commissioner informs him that his application has been granted. Morse answers on the 15th of May that he is just about to sail to Europe, and asks the Commissioner to delay the issue of his patent for the present, fearing its effect upon his plans abroad.

"On the 30th of October, 1838, he obtained his useless French patent. On his return to this country in 1840 he requests his patent to be perfected and issued.

"The application of 1838 had a set of drawings annexed to the specification. The second set of drawings required by the 6th section of the Act of 1837, being for the purpose of annexation to the patent, they were entirely unnecessary till the patent issued, and are not required by law to accompany the application when first made, and the want of them cannot affect the validity of the application.

"In many instances, owing to various causes, the patent is not issued till many months, and sometimes a year or more after the application. The Commissioner requires time to examine the specification; he may suggest difficulties and amendments; and disputes often arise, which delay the issuing of the patent. But the application does not repuire to be renewed, and is never considered abandoned in consequence of such delay. It still remains as of the date of its filing for every purpose beneficial to the applicant.

"In the present case we have, therefore, a regular application in due form accompanied by a specification and drawings filed on the 9th of April, 1838. It has not been withdrawn, discontinued or abandoned. There is nothing in the Act of Congress which requires that the patent should be issued within any given time after the application is filed, or which forbids the postponement of it for a time, at the suggestion either of the applicant or the officer. Nor is there anything in the general policy of the patent laws which forbids it. On the contrary, it has always been the practice, when a foreign patent is desired, to delay the issuing of the patent here, after application filed, for fear of injuring such foreign application. It forms no part of the policy of any of our patent acts to prevent our citizens from obtaining patents abroad.

"By the Patent Act of 1793, the applicant must swear 'that his invention was not known or used before the application.' The filing of the application was the time fixed for determining the applicant's right to a patent. If a patent had issued abroad, or the invention had been in use or described in some public work, before that time, it was a good defense to it. The time of filing the application was, therefore, made by law the criterion of his right to claim as first inventor. A foreign patent subsequent to the date of his application, could not be set up as a defense against the domestic patentee. The American inventor who had filed his application and specification at home, was thus enabled to obtain his patent abroad, without endangering his patent at home. This was a valuable privilege to American citizens, and one of which he has never been deprived by subsequent legislation. And thus the law stood till the Act of 4th July, 1836.

"Before this time the right to obtain a patent was confined to American citizens, or those who had filed their intention to become such. The policy of this act was to encourage foreign inventors to introduce their inventions to this country, but in doing so it evinces no intention of limiting our own citizens by taking away from them rights which they had hitherto enjoyed.

"Accordingly it gave an inventor, who had obtained a patent abroad, and who was generally a foreigner, a right to have one here, provided he made his application within six months after the date of his foreign patent. Neither the letter nor the spirit of this act interferes with the right of an inventor who has filed his application here from obtaining a patent abroad, or his right to a term of fourteen years, from the date of his patent.

"In 1838, therefore, when plaintiff filed his application, he was entitled to such a patent. But in March, 1839 an act was passed by the 6th section of which it is alleged the complainant's rights have been affected. That section is as follows:

"'That no person shall be debarred from receiving a patent for any invention, &c., as provided in the Act of 4th July, 1836, to which this is additional, by reason of the same having been patented in a foreign country more than six months prior to his application. Provided that the same shall not have been introduced into public and common use in the United States prior to the application for such patent. And provided, also, that in all cases every such patent shall be limited to the term of fourteen years from the date of publication of such foreign letters patent.'

"Now, the Act of 1836, as we have shown, had given a privilege to foreign patentees to have a patent within six months after date of such foreign patent. It had not affected, in any manner, the right previously enjoyed by American citizens to take out a foreign patent after filing their applications here. This section gives additional rights to those who had first taken out patents abroad, and holding out an additional encouragement to foreign inventors to introduce their inventions here, subject to certain conditions contained in the proviso. Neither the letter, spirit nor policy of this act have any reference to, or bearing upon, the case of persons who had just made their applications here. To construe a proviso as applicable to a class of cases not within its enacting clause would violate all settled rules of construction. The office of a proviso is either to except something from the enacting clause or to exclude some possible ground of misinterpretation or to state a condition to which the privilege granted by the section shall be subjected.

"Here the proviso is inserted to restrain the general words of the section and impose a condition on those who accept the privileges granted by the section. It enlarged the privileges of foreign patentees, which had before been confined to six months, on two conditions: 1st. Provided the invention patented abroad had not been introduced into public use here; and 2d, on condition that every such patent should be limited in its terms. The general words, 'In all cases,' especially when restrained to every such patent, cannot extend the conditions of the proviso beyond such cases as are the subject matter of legislation in the section. The policy and spirit of the act are to grant privileges to a certain class of persons which they did not enjoy before; to encourage the introduction of foreign inventions and discoveries, and not to deprive our own citizens of a right heretofore enjoyed, or to effect an entirely different class of cases, when the applications had been filed here before a patent obtained abroad.

"It is supposed that certain evils might arise by allowing an applicant for a patent here to delay its issue till he can obtain a foreign patent. To which, it is sufficient answer to say, that if such evil consequences should be found to exist, it is for Congress to remedy them by legislation.

"It is no part of the duty of this Court, by a forced construction of existing statutes, to attempt the remedy of possible evils by anticipation.

"I am, therefore, of opinion that the complainant's patent, as renewed, contained a valid grant of the full term of fourteen years from its original date."

The reasoning of this opinion has not yet been overcome, although it was the individual opinion of Mr. Justice Grier, when sitting on the bench of the Supreme Court.

Professor Morse, by the statement of his apprehension that the issuance of the American patent would defeat his rights abroad, and Mr. Justice GRIER, by his restatement of the same apprehension, clearly indicate that both then understood what in some countries was the foreign law in relation to patents to foreigners, *i. e.*, that a foreign patent would not be issued if a home patent had already been issued to the inventor.

The contemporaneous construction of the profession and the Patent Office was in accordance with the opinion of Mr. Justice Grier.

The decision was assumed by the Patent Office and by the profession at large as correctly attributing to the date of the American application, the giving to an American inventor a right to a patent as of such date, and as rejecting as immaterial matters accruing subsequently thereto.

Thus the Patent Office in 1871 promulgated this rule:

"An applicant whose invention has been patented abroad should state the fact that a foreign patent has actually been obtained, giving its date, and if there be more than one, the date of each."

And such rule was repeated from 1871 to and including the year 1878, three years after the Revised Statutes, when the rules of practice promulgated by the Patent Office changed the phraseology as follows:

"Section 39. Every applicant must distinctly state under oath whether the invention has been patented abroad to himself or to others with his consent or knowledge, and if it has been, that according to his knowledge and belief the same has not been in public use in the United States for more than two years prior to the application in this country. And he must also name such foreign country, and set forth the name or numbers and dates of such patent or patents if granted, in the specification."

On the margin of this rule as so printed are the words "Rev. Stats., Sections 4887, 4892. Statement as to foreign patents and public use"; and then followed the form of oath in compliance with such rule in these words:

"26. As to patents abroad. State of I., County of K., ss.: A. B., the within named applicant, being duly sworn or affirmed, deposes and says that the invention described and claimed in the annexed specification has not been patented to him, nor with his knowledge or consent in any foreign country (or that the invention described and claimed in the annexed specification has been patented to him by the Government of Great Britain by Letters Patent No. , dated), and that the invention has not to his knowledge been introduced into public use in the United States for more than two years *prior to the filing of the application.*"

This rule remained in force, and acted upon by the profession and the Patent Office, and by those dealing with the patentees and purchasing their inventions and patents until the decision of Bate *vs.* Gillett, by Judge NIXON in October, 1882, five years after the plaintiff's patent was issued, and above referred to, and in the meantime it was subjected to the ordeal of judicial construction.

In the case in the Supreme Court for the District of Columbia of United States *ex rel.* Koechlin *vs.* Marble, Commissioner (2 MacKay's Reports, 12), Mr. Chief Justice CARTTER delivered the opinion of the Court in 1879, and after quoting the language of Rule 39, said:

"We see nothing unreasonable about this rule. On the contrary, we think it a very reasonable one. The applicant is merely required to make oath in reference to a matter of which he of all persons ought to be best informed."

Section 4887 of the Revised Statutes of the United States, regulating the issuing of patents, provides:

"No person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid by reason of its having been first patented or caused

to be patented in a foreign country, unless the same has been introduced into public use in the United States for more than two years prior to the application. But every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term, and in no case shall it be in force more than seventeen years."

All that the Commissioner of Patents has required of these applicants is, that in view of the provisions of this law, they shall state under oath what patents they have obtained in foreign countries. This the applicants have refused to do, and the reason disclosed in their arguments here is that one of these patents has but three years more to run in that country. Now, the natural life of a patent originally obtained in the United States is seventeen years, but if the APPLICANT'S *invention has been previously patented in Europe, then a patent can only issue in the United States for a period limited to expire with that one of the foreign patents which shall first expire*. The reason given by the applicants for their non-compliance with the rule is, that the only power of the Commissioner is to issue a seventeen years' patent, and they argue that the clause of the statute providing for a seventeen years' term for the first inventor of any new and useful article, being inconsistent with the provisions in regard to patents obtained in foreign countries, consequently overrules it.

In *Ex parte* Mann (17 O. G., 330; decided in 1880), the Commissioner of Patents said:

"Request by the Primary Examiner for instruction. PAINE, Commissioner.

The application was filed January 23d, 1878, and on the same day an English provisional specification for the same invention was filed as a communication from this applicant in the English Patent Office. The provisional patent was sealed March 19th, 1878. The completed specification was enrolled July 20th, 1878.

The questions presented are: (1) whether an English patent, granted after the patentee filed his American application, but before his American patent is granted, limits the term of the American patent; (2) whether an English patent granted on the day which the patentee files his American application limits the term of his American patent; (3) whether within the meaning of Sections 4886 and 4887 of the Revised Statutes, the English patent is granted on the day on which the provisional specification is enrolled.

The following are the statutory provisions:

Section 4886. Any person who has invented or discovered any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement thereof, not known or used by others in this country, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, and not in public use or on sale for more than two years prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceedings had, obtain a patent therefor.

Section 4887. No person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid by reason of its having been first patented or caused to be patented, in a foreign country, unless the same has been introduced into public use in the United States for more than two years prior to the application. But every patent granted for an invention, which has been previously patented in a foreign country, shall be so limited as to expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term, and in no case shall it be in force more than seventeen years.

The last clause of Section 4887, standing alone, is evidently susceptible of such an interpretation as would restrict the American patent to the term of the foreign patent if the American patentee had obtained a foreign patent after his American application was filed, but before his American patent was granted. Such is its meaning if the word 'previously' refers to time anterior, not to the filing of the application, but to the granting of the patent. This may be the more obvious meaning of the clause when separated from its context. But the statute as a whole shows, I think, that the word 'previously' here used refers to time prior to the filing of the application. A literal construction of the clause would restrict the American patent to the term of the foreign patent granted after the American application was filed, but before the American patent was granted, even if the American patentee had no connection directly or indirectly with the foreign patent. So construed as to limit the American patent to the term of the foreign patent granted after the American application is filed, the paragraph is obviously repugnant to Section 4886, which does not permit a foreign patent to bar the grant of an American patent for seventeen years to the foreign patentee, or to any one else, if the foreign patent is not granted until after the American application is filed.

If an American patent is not restricted to the term of a foreign patent granted to a different patentee after the American application is filed, certainly an American patent should not be restricted to the term of a foreign patent granted to the same patentee after the American application is filed, f r if an American application is not to be prejudiced by a foreign patent to an independent inventor he clearly ought not to be prejudiced by a foreign patent to himself.

The effect of the two sections taken together seems to be this: It is first provided, in Section 4886, that a foreign patent granted before the invention was made by the American applicant shall bar an American patent; and, although there is no presumption than an invention not shown to have been made in a foreign country was not made before the application was filed, so also is there no presumption that it was made on any particular day before the filing of the application, and, therefore, in the absence of legitimate proof of an earlier specific date, its date is fixed by the date of filing the application. It is then provided, in the first paragraph of Section 4887, that this bar shall be of no effect as against an American applicant who is a foreign patentee of the same invention; and finally, in the last paragraph of Section 4887, it is provided that in such case the foreign patent shall limit the term of the American patent.

If the last clause of Section 4887 is to be literally construed, the attempt, as a part of the practical execution of the law, to refer in American patents to foreign patents granted before and up to their dates would, of course, be ineffectual.

There is nothing in the character of this legislation to justify any strain on the ordinary rules of construction for the purpose of extending its effect. Its object seems to be to relieve citizens of the United States from monopolies from which foreigners are exempt. But in that view the statute is a failure. Its object is only effected when the foreign monopoly is secured first. If the invention is absolutely free in every other country, or if the foreign patent is obtained last, the monopoly here is complete.

The result is, I think, that a foreign patent granted after the patentee files his American application, but before he obtains his American patent, does not limit the term of the American patent.

If the English patent had been granted on the 23d of January, 1878, the day on which the American application was filed, the English patent would not have limited the term of the American patent, for it is only when the English patent is granted before the American application is filed that such limitation takes effect. And if the law, disregarding fractions of a day, makes the grant of the English patent operative during the whole day on which it is made, from the earliest moment of that day, so does it regard the American application as on file from the earliest moment of the day on which it is filed. In the eye of the law, therefore, the English patent is not granted *before* the American application is filed; but the patent is granted and the application is filed simultaneously. Of course there is a difference in absolute time between the commencement of the English day and the commencement of the American day; but that is not to be considered.

An English patent is not granted in the sense of Sections 4886 and 4887 of the Revised Statutes until the completed specification is enrolled. In this case the English patent was not granted on the day of enrolling the provisional specification, but on the 20th of July, 1878, the day of filing the completed specification.

The applicant is entitled to a patent for seventeen years. It is not necessary that his American patent should contain any reference to the date of his English patent."

It is also a well-settled rule of law that if a literal construction of statutory language is opposed to the legislative intention, as evidenced by the full statute, such construction will not be allowed to prevail (Caledonia Co. *vs.* North Co., L. R., 6 App. Cas., 122; Frame *vs.* Clement, 44 L. T., 399). It is well settled also that when one is contending that statutory words are not to be literally construed he may lawfully do two things: (1) He may refer to other sections of the statute which affect and control the meaning of the words which it is alleged are not to be literally constructed; and (2) show that a literal construction would be repugnant to the general purview of the act (Nuth *vs.* Tamplin, 8 Q. B. D., 253).

Even the Courts announce their concurrence in the rights of litigants to request that statutes shall be so constructed as to import an

exception or other construction which will prevent injustice. Thus, in U. S. *vs.* Kirby (7 Wall., 482), the Court said:

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always be presumed that the Legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

The authorities before cited seem to show affirmatively that the actions of those learned in the law, to wit, those in charge of the Patent Office of the United States upon whom the administration of the law devolved, and those who were practicing under its provisions, and are to be regarded as experts in the interpretation of the law which was intended for their guidance, did, as matter of fact, interpret Section 4887 of the Revised Statutes as having no reference to an American inventor after he had filed his application for a patent in the Patent Office of the United States. If such was the official and practical interpretation put upon the act for twelve years by those to whom it was addressed, and who were charged with the duty of its administration, either professionally or officially, then such practical interpretation may be considered as controlling by the Court.

In Isherwood *vs.* Oldknow (3 M. & S., 397), Lord Ellenborough said:

"*Communis opinio* is evidence of what the law is; not where it is an opinion merely speculative and theoretical, floating in the minds of persons, but where it has been made the groundwork and substratum of practice."

In Chestnut *vs.* Shane (16 Ohio, 607), the Court said:

No law can require the correction of an error in its construction which has long existed and has been generally acquiesced in. If it had been the opinion of the Court that the words of the statute ought to be literally copied, and that such should have been the course from the beginning, they would have resorted to the maxim *communis error facit jus*, rather than encounter the consequences of shaking the title to an indefinite portion of the State. * * * At all events, it is by no means certain that the phraseology will not bear this construction. It has for its support the usage of the most skillful conveyancers contemporaneous with the statute, and that is a consideration of great force, one that in most cases should control, and in no case should be departed from without most cogent reasons."

See also McKean *vs.* De Lancey (5 Cranch, 29); Maher *vs.* Slate (26 Am. Dec., 379); Troup *vs.* Haight (1 Hop., 267); Commonwealth *vs.* Posey (2 Am. Dec., 500); Jackson *vs.* Gilchrist (15 Johnson, 89).

In Bruce *vs.* Schuyler (46 Am. Dec., 447), it was held that:

"Long established construction of a statute by the officers who execute it, ought to have the force of judicial determination."

In United States *vs.* Hill (120 U. S., 183), the Supreme Court refers to many cases, quotes therefrom, and uses this language:

"In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who are called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect; * * * and contemporaneous and uniform interpretation by executive officers charged with the duty of acting under the statute is entitled to weight in its construction, and, in case of doubt, ought to turn the scales. * * * A contemporaneous construction by the officers upon whom was imposed

the duty of executing those statutes is entitled to great weight, and since it is not clear that that construction was erroneous, it ought not now to be overturned."

So also in U. S. *vs.* Philbrick (120 U. S., 59), the Court used this language:

"A contemporaneous construction by the officers upon whom was imposed the duty of executing those statutes is entitled to great weight, and, since it is not clear that that construction was erroneous, it ought not now to be overturned."

The construction placed upon the act by the Patent Office and by patent solicitors generally, and upon which citizens have acted and parted with their property in the purchase of patents issued in accordance therewith, ought not to be overturned unless such construction was so clearly erroneous as not to be able to be supported by any construction of the language in question. If there is any construction of the statute which will save the patents obtained in accordance with a practice which was pursued thereunder, such construction ought to obtain in favor of those who have reposed upon the action of the officers of the government and of others skilled in the interpretation of the law, and have parted with their money on the faith thereof; or, as was said in Bennett *vs.* Ward (3 Caines, 260):

"When a statute admits of two constructions it is advisable to give it that which is most consonant to the ordinary mode of proceeding"

This element of justice to those who have acted in accordance with professional opinion and official rule and made their investments on the faith thereof. was given significant prominence by this Court in the case of Gayler vs. Wilder (10 How., 493), where it was said:

"And we are the less disposed to give it a different construction because no purpose of justice would be answered by it, and the one we now give was the received construction of the Act of 1793 in several circuits. We understand that the same rule has prevailed in other circuits, and if it were now changed it might produce much injustice to assignees who have relied on such assignments, and defeat pending suits brought on the faith of long established judicial practice and judicial decision."

Therefore, again, and as was said in Rutherford vs. Green (2 Wheat., 203):

"Whatever the Legislative power may be, its acts ought never to be so construed as to subvert the rights of property, unless its intention so to do shall be expressed in such terms as to admit of no doubt, and to show a clear design to affect the object."

Change of Phraseology in the Revision of Statutes in pari materia is without Legal Significance.

That there is some change in the language between the provision of the Acts of 1836 and 1839, and the provisions of the Act of 1870, and the Revised Statutes, would seem to be without legal significance. It appears that the Act of 1870, as well as the Revised Statutes, were intended as a revision of the pre-existing laws, including those of 1836 and 1839. The provisions of the Acts of 1836 and 1839, had, as has been shown, been judicially construed before the Act of 1870, namely, that they "related only to such patents as are applied for here, after the issue of the foreign patent." Under these circum-

stances it seems to be well settled "that where the law antecedently to the revision of the Statutes is settled, either by clear expressions in those Statutes or adjudications on them, the mere change in phraseology shall not be deemed or construed a change of the law, unless such phraseology evidently purports an intention in the Legislature to make a change. A contrary construction might be productive of the most dangerous consequence." Such was the language of SPENCER, J., in Taylor *vs.* Delancey (2 Cai. Cas., 150), of which KENT, C. J., in the case of Yates (4 Johns., 358), said:

"That the mere change in phraseology in the revised laws was not to work a change in interpretation was the unanimous decision of the Court for the Correction of Errors in 1805, in the case of Taylor *vs.* Delancey."

So also in Theriat *vs.* Hart (2 Hill, 380), Judge NELSON said:

"Though the language of the Revised Statutes varies somewhat from the old law, there is no reason for believing that the Legislature intended to change the settled rule on this subject."

To the same effect are Goodell *vs.* Jackson (20 Johns., 722); Crosswell *vs.* Crane (7 Barb., S. C. R., 195). In the latter case the Court said:

"It is well settled that in the revision of Statutes, an alteration in the phraseology, or the omission or addition of words, does not necessarily alter the construction of the act, or imply an intention on the part of the Legislature to alter the law. In a revision of the laws a reform of the language is not necessarily an alteration of the law. The intent of the Legislature to alter the law must be evident, or the language of the new act must be such as palpably to require a different construction, before the Courts will hold the law changed upon such revision, merely from the fact of a change of the language employed."

In Meyer *vs.* Car Co. (102 U. S., 11), this Court quotes from its decision in U. S. *vs.* Bowen (100 U. S., 508), in relation to the Revised Statutes of the United States as follows:

"When it becomes necessary to construe language of the revision which leaves a substantial doubt as to its meaning, the original statute may be resorted to for the purpose of ascertaining that meaning."

See also Douglass *vs.* Farrar (45 Me., 72); Burnham *vs.* Stevens 33 N. H., 247); Overfield *vs.* Sutton (1 Met., 61); Butterworth *vs.* Hoe (112 U. S., 58).

There was no intention on the part of Congress to diminish by the Act of 1870 the rights of an American inventor as they previously existed.

The original intent of Congress is shown by the Act of 1836 to have been to legislate of and concerning foreigners, who had previously taken out patents abroad, and then had come to this country and asked for a patent for the same invention.

This is clear from the language used:

"Nothing in this act contained shall be construed to deprive an original and true inventor of the right to a patent for his invention, by reason of *his* having previously taken letters patent therefor in a foreign country."

Between the Acts of 1836, 1839 and 1870, all foreign countries adopted legislation with reference to patents to foreigners, and such legislation was published in this country and was obviously before the authors of the Act of 1870.

The foreign patent laws had in 1870 become a matter of public notoriety, and were to be found in all public offices, departments and libraries in which their presence would be either necessary or useful. They have been complied and published in the United States since 1855 (Coryton or Patents, Philadelphia, 1855). Congress found, and it is permissible to assume that a legislative body was acquainted with the state of the law (Reg. *vs.* Waterford, 9 Q. B., 126), and to resort to historical investigation for the purposes of interpretation (U. S. *vs.* U. P. Co., 91 U. S., 72; Queen *vs.* Most, 7 Q. B. D., 251), that nearly every foreign country had made provision by its statute law with reference to patents foreign to the country by which such laws were passed, and to the rights of patentees thereunder, and prescribed the duration of home patents therefor thereafter taken out. There was, therefore, nothing of novelty in the proposition that Congress should, by legislation, make a similar provision, with reference to foreign patents, to rights of patentees thereunder, and the duration of American patents for the same inventions.

Therefore, when Congress sought to ascertain what foreign nations had done with reference to foreign patents and foreign inventors it found that by the laws of England, Austria, Belgium, France, the Netherlands, Portugal, Rome and Russia, foreigners who had previously to their application for a patent in such case taken out letters patent in their own country, had accorded to them the privilege of a foreign patent, the term of which could not exceed that of the home patent.

These foreign statutes, when compared with Section 25 of the Act of 1870, afford intrinsic and persuasive evidence that Congress had such laws before it in 1870, and that its intent by Section 25 was to make just such a provision touching foreign inventors and foreign patents as had been made by other nationalities, and that it intended to grant to foreign inventors the same privileges which foreign countries granted to American inventors, and to give to foreign patentees a right to an American patent which should expire when their home patent fell into the public domain.

It is clear that the legislatures of all countries assumed that the existence of a foreign patent would, unless such bar were removed by positive law, defeat the right to a local patent. That such was the effect of the earlier American statutes both with regard to an alien and American inventor has already been shown. That such was also the effect in other countries is shown by the statutes quoted in Coryton. Both Congress and the foreign legislatures were seeking to accomplish one and the same end, namely, to give to alien inventors a right to an alien patent, and to limit the enjoyment of such right to the expiration of the home patent, and all adopted nearly the same language to attain the same result.

All the legislation sought to accomplish two results (1) to give to a foreign patentee a right, notwithstanding the fact of the home patent, to obtain in a foreign country a patent for that which was covered by the home patent; (2) to make such foreign patent expire simultaneously with the home patent, in order that there might not be a monopoly in a foreign state which had ceased at home.

The general legislation of foreign countries, like that of the United States of 1836 and 1839, contemplated that a foreigner had as matter of fact taken out a home patent, and made provision for that contingency by providing, as has been said, that the foreign patent should expire simultaneously with the home patent.

Parliament and Congress alike recognized the fact that the opening of new avenues and means of communication, and the existence of positive continental laws made it quite probable that a foreign and alien patentee would take out Letters Patent not only in his own country, but also in various foreign countries, and thereafter apply either in Great Britain or in the United States for a patent in those countries respectively; and, in view of that contingency, the law of Great Britain and of the United States provided that when the foreigner had, previously to his application in the United States and Great Britain, taken out patents in other countries than his home country, the English patent and the American patent should expire with that one of the patents foreign to these countries which should first expire, to the end that whenever the patentee's rights failed abroad they should fail also in Great Britain and the United States.

All the laws were, therefore, thus complete and harmonious in their provisions. A home monopoly would not defeat a foreign monopoly; a British patent would not defeat a Belgian patent, and a subsequent British patent could not last longer than the previous shortest foreign monopoly.

It is also evident that no nation has been so unjust to the home citizen as to say in its legislation that the home patent should cease and determine during the life of a foreign patent. The intent manifested in all the laws is, that the home patent is to remain in force until the only foreign patent, if there were but one, had actually expired, and if there were more than the one foreign patent, then that the home patent should remain alive until one of such foreign patents had actually fallen into the public domain.

No government has made a distinction in the life of the home patent by providing that where there was but one foreign patent, the home patent should expire, together with the foreign patent, and when there was more than one foreign patent, then that the home patent should expire before some one of the foreign patents had actually expired and fallen into the public domain.

With this resumé of the Statutes of the United States and this historical illustration drawn from the existence and language of the foreign laws, it is quite evident that the legislation of all the countries had but one and the same object in view, namely, to provide

that a foreigner should not be debarred of his right to a patent by the simple fact of the existence of his previous home patent.

Under this statement of the actual language of the positive statutes of the various countries it would seem to be clear that each country in succession was legislating of and concerning foreign patentees and not of and concerning its own inventors. It was not the policy of any country, as evidenced by the statutes last above referred to, to prevent a home inventor from obtaining as many foreign patents as he could. Home legislation could neither prevent nor facilitate his obtaining a foreign patent. His right to a foreign patent depended upon the foreign law, and, therefore, when the law speaks of patents "obtained abroad" it is not speaking of home inventors and of their rights, but is speaking of foreigners who have already applied in the foreign country, perhaps of their domicile or elsewhere, and obtained a foreign patent, which they seek to repatent in the country whose legislation uses the phrase, "patented abroad," or its equivalent.

An inventor's rights for all purposes of his protection accrue on the filing of his application.

Section 4886 confers upon an inventor a right to obtain a patent for his invention, and Section 4893 makes it, if the Commissioner discovers no reason why the patent should not be issued, the imperative duty of the Commissioner to issue a patent therefor. The language is "shall issue a patent therefor." In the same case of Gayler *vs.* Wilder (*supra*), the Court said: "The discoverer of a new and useful improvement is vested by law with an inchoate right to its exclusive use;" and this inchoate right to a patent is recognized in the statute and in the authorities.

Further, if the right of the applicant to his patent be not absolute, as it is contended that it is, upon filing of an unobjectionable application where the only further duty of the Commissioner is one which the law says he shall perform, then certainly at some other time the right of the inventor to the patent becomes fixed beyond possibility of defeasance by subsequent acts. The statute seems clearly to indicate *when* this right does become so fixed. That an inventor, as such, has a *right* to obtain a patent is further shown by the language of Section 4896, which provides that if the inventor die before a patent is granted, "the right of applying for and obtaining the patent shall devolve" on his representatives. Section 4885 provides that "every patent shall bear date as of a date not later than six months from the time at which it was passed and allowed," and Section 4897 provides for the renewal of applications for a patent within a specified time after the allowance of the original application.

It therefore appears that the inchoate right to a patent becomes an absolutely vested right on the passing and allowance of the application, and nothing which occurs thereafter and subsequently can

defeat such vested right; certainly not any delay in the Patent Office, for, as was said in Jones *vs.* Sewell (6 Fisher, 356):

"Delays in the Patent Office which an inventor cannot prevent will not impair his title to his invention."

This was reiterated in Adams *vs.* Jones (1 Fish., 530), in which Mr. Justice GRIER said:

"The delay afterward interposed, either by the mistakes of the public officers, or the delays of Courts, where gross laches cannot be imputed to the applicant, cannot affect his rights. * * * Involuntary delays not caused by the laches of the applicant should not work a forfeiture of his rights."

In Root *vs.* Ball (4 McLean, 177) the Court said:

"Independently of the statute, the plea would have been bad as the application for a patent must protect the right of the inventor, and the delay, which may occur in the Patent Office in making out the patent, cannot operate to the injury of the applicant."

Section 4887 cannot properly be construed as meaning "previously to the American Patent;" so to construe it would open the door to fraud and unintended hardship.

If such construction is given to the section, then the rights of an independent American inventor and of his innocent assignee are placed beyond his control and beyond the protection of the law. Because if, after a domestic inventor has filed his application here, an independent foreign inventor should obtain a patent abroad before the grant of the American patent, the domestic patent would be limited to the life of the foreign patent, because the patent granted here would be "for an invention which has been previously patented in a foreign country." The fact that a domestic inventor had made his invention long prior to the invention of the foreign patentee, would not under this interpretation affect the question. No one could reasonably contend that this was the meaning of the section, and yet such result would follow from such interpretation. It could hardly be forcibly argued, that while other sections of the act protect an American inventor against foreign publications or patents, provided his invention antedates their publication, and the life of his patent is in no way affected by such publications, the accident of an independent foreign patentee procuring a patent pending the application and grant of the domestic patent, would limit the life of the latter to the term which the foreign patentee had obtained.

Again, if, after the domestic inventor had filed his application, a person knowing of the invention should fraudulently obtain a patent in his own name abroad, and before the American patent was issued, the American patent would be limited to the life of such foreign patent, because, again, the American patent would be "granted for an invention which has been previously patented in a foreign country." It could scarcely be contented that this is the law, especi-

ally in view of Goodyear Co. *vs.* Willis (7 O. G., 41); Kendrick *vs.* Emmons (9 O. G., 201).

If an American inventor assigns his application to a *bona fide* purchaser for value, as is authorized by Section 4895 of the Revised Statutes, and while he is proceeding to procure a patent for seventeen years, the inventor sells his right to a patent in Norway, where a patent is granted for ten years only, and the Norway patent precedes the American patent, then the home assignee would, if this unjust construction of Section 4887 is to prevail, be deprived, without fault of his, of seven years of his American monopoly.

If Section 4887 is to be interpreted as making the date of the American patent the pivotal date, and not the date of the application therefor, then the American inventor is subordinated, and without any concurrent act of his own, to the delays in the Patent Office, to the superior diligence of foreign patent offices, to the possible effect of fraud, and to the accident of a foreign patent, with which he was not in privity, being issued for an invention made after his application.

It is not believed that it was the intention of Congress to subordinate the rights of the American applicant to any of these contingencies. Moreover the doctrine that the filing of the application fixes and determines the rights of the applicant seems to find corroboration and support in the doctrine which has been judicially declared to be applicable to applicants for patents for lands.

Patents for lands have been repeatedly treated by the Courts as analogous to patents for inventions (Philadelphia *vs.* Stimson, 14 Peters, 459; Rubber Co. *vs.* Goodyear, 9 Wall., 788; Mowry *vs.* Whitney, 14 Wall., 434; Woodworth *vs.* Hall, 1 Wall., 395; Hughes *vs.* United States, 4 Wall., 232; United States *vs.* The Am. Bell Tel. Co., 45 O. G., 1311).

The law is well settled that when an applicant for a land patent perfects his application, his right accrues and vests, and cannot be affected by subsequent events. This is shown by the language of the Court in Stark *vs.* Starrs (6 Wall., 417), which said:

> "Before the passage of this act, the claim of the defendant Stark had been surveyed and the required proof of his settlement and continued occupation and residence made, and such steps had been taken as to perfect his right to a patent. The right to a patent once vested is treated by the Government as equivalent to a patent issued. When, in fact, the patent does issue, it relates back to the inception of the right of the patentee so far as may be necessary to cut off intervening claims."

Can any good reason be assigned under the latter half of Section 4887 why a similar rule should not be applied to an applicant for a patent for an invention? Has any such reason been yet assigned? As it is conceded that the section required judicial construction, why interpret it as taking away the right of protection which is by Sections 4886, 4899, 4920, 4923, the first half of 4887, and the general rule above referred to? Would it be judicially a satisfactory reason for such interpretation that the ambiguity of the language justifies it. If there be such ambiguity, why not resolve it so that it shall be

in harmony with the other portions of the law, and protect the inventor and not the infringer?

The argument may be reinforced by further considerations.

1. It is evident from Section 4886 that the Commissioner cannot lawfully refuse an American patent by reason of a pre-existing foreign patent, unless such foreign patent were issued "before the American invention or discovery."

2. It is equally evident that an infringer cannot attack the validity of an American patent by reason of a pre-existing foreign patent unless he produces a foreign patent issued prior to the American invention or discovery.

Hence, these are two instances in which a foreign patent is without significance unless it preceded the American invention or discovery.

This question then recurs, whether Congress meant in the third instance in which it alludes to a foreign patent to give to it the effect of defeating an American patent, which effect it had denied in the other two instances.

Two classes of inventors are provided for by the statute. First, those where a patent is sought by an applicant having at the time no patents on his invention either in this or in foreign countries, and his rights are fixed under Section 4886. Second, those under Section 4887, which deals with the case of an applicant who has made an invention abroad and who at the time of his application here has already patented it abroad. The clear meaning of this latter section is that that fact shall not debar him from obtaining a patent here, but that his American grant shall be a limited one, commensurate in life with that of his existing foreign patent.

This section, moreover, clearly contemplates the condition of affairs existing at the time when the application is filed in the office here. "Proviously patented" clearly means patented previously to the application.

There is no restriction upon the right of an American patentee after the grant of his patent from patenting his invention abroad if he can do so. Nor is the life of his domestic patent in any way affected by his so doing. It cannot in reason be supposed that the accident of his applying for and obtaining a foreign patent intermediate his domestic application and the domestic grant introduced a new policy in legislation. Such a difference would be utterly without reason, and had such been the intention of Congress it would have been clearly expressed. And yet if "previously patented" means previously to the grant, and not previously to the application, there would be this absurdity in the law, that if twenty-four hours after the American patent was issued a foreign patent was granted to the same inventor it would have no effect whatever on his American patent; whereas, if the foreign patent, though applied for later than the American application issued twenty-four hours before the American patent, the life of the American patent would determine with that of the foreign grant.

The policy of Section 4887 is very clear. While it gives to a

foreign patentee the right to obtain a patent in this country, it was designed to prevent the continuance of a monopoly here when the invention had become public in his own country. The object of Congress was not in any way to shorten the life of the American patent, or to grant a less term than seventeen years here; provided, always, that Americans stood on an equal footing with foreigners; that is, that we were not to be burdened with the monopoly after it became open abroad. If it were protected there for seventeen years, the patentee was at liberty to enjoy his seventeen years here, but Congress appreciating the fact that in many foreign countries the patentee could enjoy a monopoly for more than seventeen years, either by the general law of those countries or through special enactments, in making the life of his patent here co-extensive with the life of his foreign patent provided that "in no case shall it be in force more than seventeen years."

Congress has always studiously protected the rights of an American inventor from possibility of injury from acts abroad—unless such acts transpired prior to one of two dates—either the date of the invention or the date of the application. It will, therefore, be a new departure if Congress has intentionally provided that any act subsequent to the one or the other of those two dates, shall terminate the life of an American patent.

Two instances have already been given in which the foreign act is required to precede the invention. There are many other instances in which the foreign act is required to precede the application.

The statute of 1793 required the act in order to defeat the patent to have transpired "before the application."

The Act of 1836 required an oath that the invention had not been used abroad down to the date "of petitioning," which is another word for "application."

The Act of 1836 provided that a foreign patent should not defeat an American patent, unless the same had been published within six months next preceding "the filing of the specifications and drawings."

The Act of 1839 provided that the American patent should not be defeated by reason of a patent in a foreign country "more than six months prior to the application," provided that the same should not have been introduced into public and common use in the United States prior to the application for such patent. The law remained in this condition for thirty-one years, and until 1870.

It results, therefore, that prior to 1870 it was not the intention of Congress that an American patent should be defeated or limited by a foreign patent unless such foreign patent existed either prior to the invention or prior to the application.

The question now recurs whether Congress, by the Act of 1870, as incorporated in the Revised Statutes, intended to remove the barrier fixed by these dates and to subject an American patent to limitation by reason of a foreign patent issued after the American application was duly filed.

It has already been shown that no such intention was supposed,

either by inventors, or by patent solicitors, or by patent officials to have been entertained by Congress until the decision in Bate *vs.* Gillett, published in October, 1882.

A careful examination of the revised statutes seems to justify the assertion that Congress not only did not intend to modify the effect of the dates of the invention, and of the application, which it had previously accorded to them, but, on the contrary, intended to preserve those dates as the ones beyond which no act subsequently occurring could either invalidate or limit the patent.

By Section 4886 the foreign patent must have been "before the invention or discovery thereof," and the public use must have been "for more than two years prior to his application."

By Section 4888 the inventor is required to make "an application."

By Section 4892 the inventor is thereafter styled "the applicant."

By Section 4893 it is made the duty of the Commissioner "on the filing of the application to issue the patent therefor," unless he finds a reason under Section 4886 for not doing so.

By Section 4894 it seems to be made the duty of the Patent Office to facilitate the application so as to have the same prepared "for examination within two years after the filing of the application," and so to provide a period of two years after the filing of the application, within which the Commissioner may examine it.

By Section 4895 an assignment by an inventor is authorized, but in such case "the application must be made by the inventor."

By Section 4899 no innocent manufacturer or purchaser is protected unless the manufacture or purchase was made "prior to the application by the inventor or discoverer for a patent."

By Section 4904 the Commissioner is to give notice whenever "an application is made which would interfere with any unexpired patent."

By Section 4920 the foreign patent to defeat an American patent must have been "prior to the supposed invention or discovery thereof," and the public use to invalidate must have been "for more than two years before the application for a patent."

By Section 4923 it is provided that "whenever it appears that a patentee at the time of making his application for the patent believed himself to be the original and first inventor," his patent shall not be declared void by reason of foreign user "if it had not been patented or described in a foreign publication."

It is evident therefore, that up to this point Congress had not relinquished its intention of preventing injury to an American inventor from acts which transpired subsequently to his invention or application.

The inquiry recurs, whether the protection which was afforded by both the acts of 1836 and 1839 against all foreign patents which did not precede the time "of the filing of his specification and drawings" and "his application" has been intentionally withdrawn by Con-

gress, and the American patent for the first time intentionally subjected to the limitation of a foreign patent issued after the American patent was applied for.

Such a conclusion, in view of a pre-existing intention, of the present manifest intention, and of contemporaneous interpretation, and of the existence of rights acquired thereunder, ought not to be reached to the detriment of third parties, unless within all rules of judicial interpretation, such conclusion is inevitable.

Both the Act of 1870 and Section 4887 use the now familiar phrase of "prior to the application" as being the date beyond the term affixed to which the act of public use of a foreign patent cannot defeat or invalidate an American patent.

Both the Act of 1870 and Section 4887 require the foreign patent to have been "issued prior to the application," because the "public use" referred to is indissolubly connected with the foreign patent," and it is the user of the foreign patent for more than two years prior to the application which alone can defeat or invalidate the American patent, and, therefore, in order to limit an American patent, there must be such a foreign patent as the user of which for more than two years prior to the application would defeat the application.

The mere user abroad without the foreign patent is by Section 4923 rendered harmless, but when the user here has been under foreign patent, then, and only then, if it has extended "for more than two years prior to the application" does such foreign patent limit the life of the home patent.

Under Sections 4886 and 4920 the foreign patent must have preceded the invention or discovery.

Under Section 4887 the foreign patent must have united with it in order to limit the American patent, the user thereof in this country "for more than two years prior to the application," and there can be no use of a foreign patent unless the patent precedes the user.

It would seem obvious, therefore, that the words "previously patented in a foreign country," as used in Section 4887, refer to the same patent, the use of which "for more than two years prior to the application" is by the same section to limit or defeat the American patent, and not to a patent issued subsequently to the application.

The construction thus contended for does not require a departure from the ordinary rules of judicial interpretation. Thus in Pennock *vs.* Dialogue (2 Peters, 1), the Court, in order to save the rights of a patentee against his own previous user, read into the Act the words "by others," saying that a literal construction would be absurd and unjust, and that "there was much reason for the limitation thus imposed by the Act."

This reading was affirmed by Shaw *vs.* Cooper (7 Peters, 319).

It would seem to be absurd to construe the section as meaning that no person should be debarred from receiving a patent, nor should such patent be declared invalid by reason of a foreign patent not issued before the invention or discovery, and not accompanied by

two years' prior use here, and at the same time to hold that a foreign patent, issued after the invention and discovery here, and which had never been introduced into use here, should have the retroactive effect to invalidate an American patent previously applied for.

That this construction is the proper one is shown most clearly by Section 25 of the Act of 1870, which is printed as one sentence. That such sentence is divided into two sentences in Section 4887 is without legal significance. Under Section 25 it is quite clear that the foreign patent, which is to terminate the American patent, must have preceded the American application. The last half of the sentence means and intends "provided that the same" (*i. e.*, the foreign patent just above referred to) "shall not have been introduced for more than two years prior to the application, and that the" (American) "patent shall expire with the foreign patent" (*i. e.*, with the foreign patent first above referred to); thus meaning and referring to the same foreign patent as the Acts of 1836 and 1839, *i, e.*, one before the American application.

The same construction was meant and intended by Section 4887, in which the words "first patented in a foreign country"; "previously patented in a foreign country," and "foreign patent," all refer, as in the Act of 1870, to the one and the same foreign patent.

Again. On the 25th of May, 1883, the Canadian Legislature, as has been said, passed an Act (p. 63), which repealed Section 17, of the Patent Act of 1872, and substituted therefor a new Section 17 which contained among other things as follows:

> "Every patent heretofore issued by the Patent Office in respect of which the fee required for the whole or for any unexpired portion of the term of fifteen years, has been duly paid according to the provisions of the now existing law in that behalf, has been and shall be deemed to have been issued for the term of fifteen years, subject in case a partial fee only has been paid to cease on the same conditions on which patents hereafter issued are to cease under the operation of this section."

The 34th Section (p. 12) of the Patent Act of 1872, prescribes the fees to be paid on procuring an extension of a patent from five to fifteen years at $40.00, and makes the same payable to the Commissioner before an application for such extension shall be entertained. The two extensions (pp. 30 to 32) having been granted, afford evidence that the fee for such extension had been theretofore duly paid as required by the Act of 1883.

The next question, no point of which has been decided in this Court, is whether under Section 4887 the Bate patent expired at the end of five years from January 9th, 1877, the date of the Canadian patent. By the law of Canada, as we have seen, Mr. Bate had an absolute right upon payment of a certain fee to prolong his patent for fifteen years from the above-mentioned date, and the law being a necessary part of the contract the patent itself is under the Act of 1872 a patent for fifteen years at the absolute will of Mr. Bate or his assignees in title. Our position thereupon is, that if it had been necessary for Bate's American Patent to have expressed the precise state of things in Canada, it would have said that it should expire at the end of five, ten or fifteen years, as Mr. Bate, in his absolute right,

might determine. If it be said that a somewhat definite term is intended to be ascertained at the very moment of issuing a patent, then the term should in favor of a patent be construed to be fifteen years, with a defeasance in the power to enforce the patent privilege in case of non-payment of the fees, rather than a term of five years. That this is the true construction of the Canadian law and the true meaning of the grant has been declared by the highest authority in Canada, the Parliament, which, in 1883, passed the new and revised Section 17 (p. 63), which we have cited above. That the Canadian Parliament has power to construe and act even in a mode, which we should call retrospective, cannot be denied. They are the highest court as well as the highest legislative body in this respect, and in a case which is printed with the record (p. 104) the Court of Queen's Bench has held that Parliament had power to reverse the decision of the Privy Council by a retroactive statute and to make its own adjustment of the costs. So also the Superior Court for Lower Canada, in passing upon this very patent, in a judgment, which is printed in the record (p. 39), uses these words:

"And it is further adjudged and declared that the said patent of the 9th day of January, 1887, was legally issued, and the said patent and the renewals thereof have been obtained legally, and far from being null *ab initio* the said patent has never ceased to be since the issuing thereof and is still in full force, vigor and effect through the renewal of the 12th of December, 1881, and as moreover declared by the Statute of 1883 (46 Victoria, Chapter 19)."

Not only because it was renewed, but by virtue of the act, it declares it had always been a patent for fifteen years.

The question of fact as to what was the duration of the Canadian patent and at what time it could properly be said to have expired is in Canada a question of law, and has there been decided by Parliament and by the Court, and is proved, moreover, by the affidavits of two learned gentlemen duly annexed to the record. Upon such a point our statute and our Courts must follow the foreign interpretation because, by the very terms of the statute, the duration of our patent is to depend on the duration of the foreign patent and in any question of doubt that foreign question must necessarily be referred to those who made the law and granted the patent in question.

In one aspect and under the first contingency provided by Section 4887, for limiting the duration of an American patent, the question involved is one of fact. The language of the section is:

"Every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same with the foreign patent."

This would seem to mean that the question involved is one of fact and which would be for submission to the jury under proper instructions were the action at law, viz., Has the foreign patent expired? The statute seems to imply an absolute expiration of the foreign patent and not a potential one. It seems to intend that the invention secured by the foreign patent shall by the actual expiracy of the foreign patent have fallen into the public domain.

There never was a moment under the Canadian law when Bate's invention fell by the law into the public domain. That act of 1872

under which the patent was issued gave an absolute right for the extensions of time which were granted, and it required at least one of such extensions of time to be asked for and granted before the hour of the expiration of the original five years. That was done in this case and therefore Bate's Canadian patent has not yet expired and therefore there can be no evidence adduced from the foreign law that Bate's foreign Canadian patent has expired so as thereby to terminate the life of his American patent. The possibility that it might have expired at the expiration of the first five years is not made by Section 4887 a factor in determining the question of fact whether such patent has actually expired. If it has not actually expired then under Section 4887 the fact that it might have expired is without logical consequence.

If these views thus presented are sound, it would seem to result—

1st. That the Canadian patent, having been applied for and issued after the filing of the American application, cannot legally affect the duration of the American patent.

2d. That the Canadian patent had not expired at the commencement of this suit, and has not yet expired, and does not therefore terminate the existence of the plaintiff's patent, or his right to maintain this suit thereon.

WM. M. EVARTS,
RICHARD N. DYER,
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JOHN LOWELL,
C. A. SEWARD,
of Counsel.

December, 1888.

UNITED STATES SUPREME COURT.

THE BATE REFRIGERATING COMPANY,
Appellant,

vs.

GEORGE H. HAMMOND & CO.

SUPPLEMENTAL BRIEF FOR APPELLANT AS TO THE PATENT LAW OF CANADA.

In addition to the position taken in the independent brief, that the term of a foreign patent is to be determined as well by the foreign law which authorizes the monopoly, as by the parchment grant which evidences it, and that such foreign law is not a question of law but a question of fact to be determined upon evidence, some further suggestions are to be made with reference to the laws of Canada as involved in the present case.

In acting upon foreign laws the Courts make no distinction between written and unwritten laws, and in so acting the Court also receives with the foreign laws the foreign interpretation, which is unwritten law, and does not distinguish the written foreign interpretation from the unwritten foreign interpretation (Bishop on Written Laws, Sec. 105).

The construction which is placed by foreign tribunals upon foreign laws is, by reason of comity, and upon other well-settled principles of jurisprudence, received as controlling (Jessup *vs.* Carnegie, 80 N. Y., 441; Leonard *vs.* Columbia Co., 84 N. Y., 48).

The point was clearly stated in Hoyt *vs.* Shelden (3 Bosworth, 302) by Justice Woodruff, as follows:

"But we are not without the aid of interpretation given to this statute by the Courts of New Jersey. I need hardly say that the exposition of her Courts is to be taken by us as conclusive. It is the voice of the State herself speaking by the authorized expounders of her own laws, and their interpretation is, we apprehend, to be received with the same force as if that interpretation was incorporated in the statute in terms."

The question of the interpretation of foreign law is a question of fact, and is not what is the just and true interpretation, but what is the actual interpretation of the statute by the foreign tribunal. And, as was said in Ingraham *vs.* Hart (11 Ohio, 256):

"The existence of a law of another State is a question of fact triable by a jury, and provable, if necessary, by witnesses."

In Holman *vs.* King (7 Met., 388) the Court said:

"The Court was requested to decide authoritatively what was the law of the State of Georgia as to the matter in issue. This the Court declined to do, and the question was left to the jury to decide as a fact, with such instructions to assist them in ascertaining and applying the law as were deemed proper, and to which there was no objection. That foreign laws, whether written or unwritten, are to be proved as facts is well established. The only difference is as to the mode of proof. (Mostyn *vs.* Fabrigas, Cowp., 174; Male *vs.* Roberts, 3 Esp. R., 164; Millar *vs.* Heinrick, 4 Campb., 155; Haven *vs.* Foster, 9 Dick, 130.) And the same rule of law is applicable to the construction of foreign statutes. The question for the jury to decide was, what had been the construction given to the statute as to this case by the Court in the State of Georgia."

Turning now to the Canadian law, and it appears that by the original Constitution of Canada authority was given to the Parliament of Canada by the Home Parliament to enact general laws, and among others, laws relating to "Patents of invention and discovery."

Under this power the Canadian Government passed the Patent Act of 1872, under which the legal term of Letters Patent was fixed at fifteen years, and under which the patent in question to Bate was issued, and which patent purported to have been issued for a period of five years, from and after January 9th, 1877.

By the Act of May 25th, 1883, the Parliament of Canada construed the Patent Act of 1872, and in so doing enacted that:

"Every patent heretofore issued by the Patent Office, in respect of which the fee required for the whole or for any unexpired portion of the term of fifteen years has been duly paid according to the provisions of the now existing law in that behalf, has been and shall be deemed to have been issued for the term of fifteen years, subject, in case a partial fee only has been paid, to cease on the same conditions on which patents hereafter issued are to cease under the operation of this section."

The present Bate patent comes within this Act of the 25th of May, 1883, and its original term is therefore declared by that Act to have been fifteen years. If this declaration by the Canadian Parliament is binding upon the American courts, then the Bate patent has not expired and will not expire until the expiration of the fifteen years from January 9th, 1877. Is there any solid reason why this Act of the Canadian Parliament of 1883, construing its Patent Act of 1872, should not be received by this Court as controlling?

The answer to this question involves two considerations; first, with reference to the powers of the Canadian Parliament, and, secondly, as to the effect to be given to the exercise of such powers by the judicial tribunals of a foreign country.

All the elementary writers concur in the existence of a power in the British Parliament to pass such laws as it pleases, and as to the binding character of such laws when passed. In Hollin's Jurisprudence (p. 301) it is said:

"The sovereign power of the State as thus ascertained is omnipotent. Since it is the source of all law its acts can never be illegal. As little can they be, strictly speaking, unconstitutional. The latter term is properly applied only to characterize an act of inferior political authority in excess of its delegated powers. Thus a statute passed by the Congress of the United States may be unconstitutional because the sovereign people has empowered the President and Congress to legislate only subject to certain reservations, and has entrusted to the Supreme Court the duty of deciding whether any given enactment is or is not made in pursuance of the restricted powers thus delegated. But the authority of

the Queen, Lords and Commons in England is fettered by no such limitation. An act is, strictly speaking, never unconstitutional unless it is also illegal, and can never be either if it is the act of the sovereign power."

In Anson's Law and Custom of the Constitution (p. 208) it is said:

"The most prominent and perhaps the most important function of Parliament is legislation. Its control over every rule of conduct which it may choose to take in hand is direct and absolute. Given a certain correspondence with public opinion, and Parliament is omnipotent. From it there is no appeal save to the Electorate, and the Crown only can make that appeal. Parliament could recast the framework of the executive which it is generally content to criticise. The courts of law will not venture to consider whether these enactments are advisable. They will only endeavor, when required, to ascertain what those enactments mean."

Blackstone (1 Com., 161) uses this language:

"The power and jurisdiction of Parliament, says Sir Edward Coke (4 Inst., 36), is so transcendent and absolute that it cannot be confined either for causes or persons within any bounds. It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing and expounding of laws concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime or criminal. It can, in short, do everything that is not naturally impossible. So long, therefore, as the English Constitution lasts, we may venture to affirm that the power of Parliament is absolute and without control."

Our own courts (Salters *vs.* Tobias, 3 Paige, 344) when speaking of this power say:

"In England, where there is no constitutional limit to the powers of Parliament, declaratory law forms a new rule of decision, and it is valid and binding upon the Courts not only as to cases which may subsequently occur, but also as to pre-existing and vested rights."

This power in Parliament of passing what Blackstone terms "expounding laws," and what are elsewhere termed "declaratory laws," appertains to Parliament, which, in all such matters, exercises its original and constitutional power as a Court, which judicial function is stated by Blackstone (Book I., page 161), in language borrowed from Sir Matthew Hale, as follows:

"This being the highest and greatest Court, over which none other can have jurisdiction in the Kingdom, if, by any means, a mis-government should in any way fall upon it, the subjects of this Kingdom are left without all manner of remedy."

This judicial power of Parliament is also stated by Jacob (Law Dic., Tit. Parliament) in these words:

"In fine, Parliament is the highest and most honorable and absolute Court of Justice in England."

And he cites the language of Coke and Blackstone, above quoted, and says that:

"The high Court of Parliament is the Supreme Court in the Kingdom, not only for the making but also for the execution of laws."

And he quotes from Sir John Fortescue the declaration that:

"The high Court of Parliament is so high and mighty in its nature that it may make law, and that which is law it may make no law, and the determination and knowledge of that privilege belongs to the Lords of Parliament and not to the Justices."

One of the ascribed and universally acknowledged functions of this high Court of Parliament is, therefore, "to make law, and that which is law it may make no law."

In passing an "expounding or declaratory" act, therefore, Parliament is in the exercise of a judicial function which is recognized throughout its jurisdiction as absolute and everywhere controlling.

This judicial power in Parliament to construe its antecedent legislation is illustrated by Morris *vs.* Mellin (6 B. & C., 454), in which the Court admits that a subsequent statute was a legislative declaration as to the interpretation of a former statute and pursues the same; and that this power will be recognized in the Courts of this country is stated in the United States *vs.* Freeman (3 How., 364) as follows:

"And if it can be gathered from a subsequent statute in *pari materia* what meaning the Legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning and will govern the construction of the first statute."

It is clear, therefore, that the British Parliament has the power to pass declaratory acts, and that its declarations in that regard are binding upon the English judicatures.

Apparently the same power exists in the Legislatures of the several States and of the United States. In Satterlee *vs.* Matthewson (2 Peters, 412) the Court said:

"This law may be censured as it has been, as an unwise and an unjust exercise of legislative power; as retrospective in its operation; as the exercise by a Legislature of a judicial function, and as creating a contract between parties where none previously existed. * * * * If the effect of the statute in question be not to impair the obligation of either of those contracts and none other appears upon this record, is there any part of the Constitution of the United States to which it is repugnant? It is said to be retrospective. Be it so. But retrospective laws which do not impair the obligations of parties or partake of the character of *ex post facto* laws are not condemned or forbidden by any part of that instrument. All the other objections which have been made to this statute admit of the same answer. There is nothing in the Constitution of the United States which forbids the Legislature of the State to exercise judicial functions."

This plenary power of the British Parliament has been constantly claimed by the Colonial Parliaments, and such claim has been maintained and allowed by the Colonial and British Courts (Queen *vs.* Riel, Can. Pub. Doc., p. 194; Valin *vs.* Langlois, 3 Sup. Cr., 1; Hodge *vs.* Queen, L. R., 9 App. Cas., 117; Queen *vs.* Burch, 5 App. Cas., 904; City of Frederickton *vs.* Queen, 3 Sup. Cr., 505), and was affirmed by the Supreme Court in the Canada Southern Co. *vs.* Gebhard (109 U. S., 532) in these words:

"There is no constitutional prohibition in Canada against the passage of laws impairing the obligations of contracts, and the Parliament of the Dominion had, in 1878, exclusive legislative authority over the corporation and the general subjects of bankruptcy and insolvency in that jurisdiction. As to all matters within its authority, the Dominion Parliament has plenary and legislative powers as large and of the same nature as those of the Imperial Parliament."

The act of the Canadian Parliament in question, therefore, was within its constitutional power, and was the act of the Supreme Court, and would seem to be as conclusive upon this Court as it was held by the Canadian Court in Campbell *vs.* Bate to be conclusive upon it.

It cannot properly be said that to give literal effect to the language of this Canadian Act interferes with the vested rights of any American citizen, and therefore that this Court ought not to give it the effect which the Canadian Parliament intended it should have.

There is no vested right in an American citizen to use a patented invention after the expiration of the patent. A vested right has been defined to be (Union Co. *vs.* Powers, 4 Bis., 333) "a fixed and established right not liable to be defeated by any contingency."

The right of an American citizen to use a patented invention after the expiration of the patent does not fall within this definition, because the rule is well settled that there cannot be a vested right in an expectancy based upon the anticipated continuance of general laws. A power that authorizes or proposes to give, may also revoke before an interest is perfected in a donee (Cooley's Cons. Lim., 358; Miller *vs.* Sherburne, 1 N. H., 217; Lightering *vs.* Flanders, 39 N. H., 304; 1 Kent Com., 455).

Patent privileges are purely statutory, and the right to use the same upon the assumption that the invention will become public upon the expiration of the patent is purely a contingent right, and as such it has been notoriously interfered with by the legislatures of Great Britain and of the United States. Stead *vs.* Cary (1 Mann, G. & S., 496) is an illustration that Parliament claims to exercise the power of validating a patent so as to cut off the rights of one lawfully using the patent in the interval, and that the British Courts acknowledge the power.

The action of Congress in reference to patent privileges, as evidenced in the "Private Laws" concerning the patents to Adamson, Browning, Eastman, Gale and Jennings, affords conclusive evidence that Congress claims the right to extend expired patents by Acts passed after their expiration and in so doing not to provide for and therefore not to acknowledge any rights as having been vested in the interval which Congress was required to protect.

Under these circumstances, therefore, there is no argument to be founded upon alleged vested rights which requires the Court to decline to give full effect to the Canadian Act according to its terms, because it would interfere with the rights of American citizens to use the invention in question after the expiration of the American patent.

The Canadian Act having been constitutionally passed and not interfering with any vested rights ought to receive in this Court the same interpretation that it receives in the Canadian Courts.

WILLIAM M. EVARTS,
RICHARD N. DYER,

JOHN LOWELL,
CLARENCE A. SEWARD,
Of Counsel.

Dec., 1888.

Supreme Court of the United States.

OCTOBER TERM 1888.

THE BATE REFRIGERATING COMPANY, App'l't,
vs.
GEORGE H. HAMMOND & COMPANY, Appellee. } No. 862.

Suggestions in reply to certain positions taken in the brief filed on behalf of the United States Electric Lighting Company and three other companies.

I.

The policy of the patent law is not primarily to benefit the public, but to stimulate invention. This is evident from the constitutional provision which offers the reward of a limited exclusive proprietary right. The benefit to the public accrues after the expiration of the limitation.

II.

Rule 29 of the Rules of Practice of the Patent Office, referred to in the brief of the electric lighting companies (p. 30) as showing that the rules of the Patent Office referred to in our brief, are not a practical interpretation of the statute, only serves to confirm our views. That rule gives precedence in the examination to "applications * * * for letters-patent for inventions for which a foreign patent has already been obtained," *i. e.*, before the application.

III.

Under the pressure of recent decisions, and in 1888, the Patent Office made a new rule, No. 63, sub-section 4 of which accords precedence in the examinations to "applications covering inventions patented or caused to be patented, or for which applications have been made by the same inventor in foreign countries."

IV.

Under the English law the date of an English patent is the date of the provisional specification, and nothing which thereafter happens in a foreign country affects the grant.

The American law, for the purpose of a defence to an American patent, treats the English patent as issued on the date of the enrollment of the complete specification, and not as of the date under the English law. Hence, the grant under the section of the English patent law of 1852, quoted in the brief for the electric lighting companies (p. 25) is equivalent to the *application* under our law. Or in other words, the time of grant in the English statute quoted in the brief, is the time the inventor first appears at the Patent Office, all patents being dated back to that time.

V.

A foreign patent granted after the filing of the provisional specification, but necessarily before the enrollment of the final specification, has been held not to limit the English patent under 15 and 16 Vict., c. 83, s. 25, although if the foreign patent has expired, the fact may furnish a reason for not extending the English patent.

The final specification is enrolled six months after the filing of the provisional specification.

15 and 16 Vict., c. 83, s. 9.

In the following cases the foreign patents were granted less than six months after the date (*i. e.*, filing of provisional specification) of the English patents, but before the enrollment of the final specification:

Winan's Patent, L. R., 4 P., C. 93.
Blake's Patent, L. R., 4 P., C. 535.

VI.

The policy of the similar provision of the English patent law (S. 25 of 15 and 16 Vict., c. 83) has been stated by the English courts.

The policy of the act, it was said by Sir J. T. Coleridge, "is to prevent in the case of inventions made and patented in any foreign country the continuance of a monopoly in this country by virtue of any patent subsequently granted here beyond the time when the discovery shall have become public property in the foreign country."

Hill's Patent, 1 Moo. P. C. C. (U. S.), 258.

And Sir W. P. Wood, V. C., said:

"Now, in looking at section 25, one sees at once that the object was to prevent the subjects of this Kingdom from being fettered in their right to compete with each other in the production and manufacture of different articles, when it was open to foreigners to enter into such competition without being fettered by any exclusive rights claimed by an inventor or patentee or by an additional price which must be imposed upon the article in consequence of the patent right. The object, I say, is to prevent the English manufacturer from being fettered while the foreigners remain free."

Daw *v.* Eley, L. R., 3 Eq., 570.
Normant's Patent, L. R., 1 P. C., 193.
Johnson's Patent, L. R., 4 P. C., 75.
Winan's Patent, *id.*, 94.
Blake's Patent, *id.*, 535.

VII.

The only diligence which the patent law requires of an inventor is as between him and the United States Patent Office and the public, and not as between him and the foreign patent office.

VIII.

The home and foreign applicant being one and the same person, there are no evils to be redressed or prevented by according precedence to the application or the patent.

IX.

That the law of 1870 was presumably applicable to aliens (see Fisher's decisions in cases of Mushet and Boyer).

Mushet's case, Commissioner's Decisions for 1870, p. 108, Fisher, Commissioner:

"The intention of Congress obviously was to obtain for this country the free use of the inventions of foreigners as soon as they became free abroad. This is indicated by the use of the phrase 'first patented, or caused to be patented in a foreign country,' for it was presumable that American citizens would obtain their first patent here, while a foreigner would first patent his invention in his own country.

"The statute was designed to prevent a foreigner from spending his time and capital in the development of an invention in his own country, and then coming to this to enjoy a further monopoly when the invention has become free at home. The result of such a course would be that while the foreign country was developing the invention and enjoying its benefits, its use could be interdicted here; while, if the term of the monopoly could be further extended here, the market could be controlled long after the foreign nation was prepared to flood this country with the unpatented products of the patented process."

Boyer's case, Commissioner's Decisions for 1870, p. 131, Fisher, Commissioner:

"I was and am of the opinion that the policy which Congress plainly declares in this section is that, if a foreigner obtains a patent in his own country, and permits it to expire there, it shall also expire in this country, so that the right to use the invention without liability to the inventor shall be simultaneous in this and in the most favored foreign nation. * * * It is reasonable to suppose that the inventor will follow up his earliest patent with the greatest vigor, and that other things being equal, he will patent his invention in that country where he expects to make the most use of it."

X.

One of Fisher's decisions is quoted as showing a practical interpretation by the Patent Office of section 25 of the act of 1870.

Smith & Skinner p. 131, Comr's Dec., 1870.

This decided only that a United States patent should not, under his discretion, be extended, if a foreign patent had already expired. This decision was in September, 1870, and was founded upon the previous decisions in cases of Boyer and Ward (p. 130), made on the preceding day, which reached the same conclusion. The latter are bottomed upon the preceding decision in Mushet's case to the same effect.

These applications were for an extension under the act of 1870, which authorized extensions of patents granted prior to March 2, 1861.

The act of 1870 did not make section 25 applicable to such extensions.

Commissioner Fisher thought that it was the policy of Congress to apply section 25 to such extensions.

These three decisions of Commissioner Fisher were specifically overruled December, 1870, within three months

after they were made, in the cases of Appleby & Clissold, Neville and Putnam, by Commissioner Duncan, who granted the extensions, notwithstanding the expiracy of the foreign patent.

Comr's Decs., 1870, p. 163, 167 and 168.

XI.

There is no rule or decision of the Patent Office which contradicts our position as taken in our brief, unless it be Rule 63 of 1888—that the Patent Office has never suggested that it was the duty of an applicant to express his intentions, after his American application had been duly filed, as to taking out foreign patents.

The Smith and Skinner case (Comr's Dec., 1870, p. 131), already referred to as having been reversed, uses this language:

"It is immaterial whether the American patent was applied for before the foreign patent or not."

This was said in reference to the effect upon the right to an extension of the fact that a foreign patent for the same invention had actually previously expired. It was not said with reference to the date of the expiracy of an American patent by reason of a foreign patent. The latter question was not before Commissioner Fisher and was not decided.

XII.

The three decisions of Fisher, Leggett, and Marble cited against us, as to the policy of the law, have no bearing.

Tucker *v.* Davis simply held that parole evidence, as to the date of the actual production of an invention in a foreign country, was inadmissible.

Bell *v.* Brooks holds the same point, citing Tucker *v.* Davis.

Ex-parte Boyer, as has been shown, treated solely of the right to an extension.

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Brief on behalf of Edison Electric Light Co.

SUPREME COURT OF THE UNITED STATES.

THE BATE REFRIGERATING CO.,
Appellant,

vs.

GEORGE H. HAMMOND & CO.,
Appellee.

NOAH DAVIS,
Of Counsel.

Evening Post Job Print, New York.

Supreme Court of the United States

THE BATE REFRIGERATING CO.,
Appellant,

vs.

GEORGE H. HAMMOND & CO.,
Appellee.

Brief on behalf of Edison Electric Light Company.

I.

The patent laws of the United States long prior to the enactment of the statutes under construction in this case, had created a system under which inventors might make original applications, and thereby entitle themselves to receive patents, on establishing certain facts necessary to be averred in such applications. Under that system, when an American inventor presented his application for a patent in conformity to the requirements of the statutes, and to the rules of procedure established by the Commissioner of Patents, his rights were fixed by the then existing facts upon which the Commissioner was to pass;

and the determination of such rights depended upon his status at the time of presenting and filing his application as an original inventor of a novel and useful invention which had not been patented elsewhere. Whenever delay occurred in the official action upon his application, the inquiry always remained the same as though such action were prompt and immediate; and it wholly related to the rights of the applicant as an original inventor of an unpatented invention at the time of filing his application. Official delays could not impair his rights whenever the Commissioner finally adjudicated the elementary questions of novelty, usefulness and priority at the time of presenting his application, in his favor.

This system has continuously remained in full vigor and operation, and under it Mr. Bate, as an original American inventor, made his application, and received the patent now in controversy. It is not contended nor disputed but that he was entitled to a patent as a *domestic inventor first applying for a patent in the United States;* but, that a subsequent incident occurred long after, and while his application was pending, *sub judice*, which so changed his rights as to limit the duration of his patent to five years instead of seventeen years.

Whether that incident had any effect whatever upon his rights depends wholly upon the construction of statutes enacted long after the creation of the system under which his application was made. They are statutes relating to another class of inventors, who could make no application for a patent in this country under the system existing before their enactment, and could acquire no rights whatever to protection by patent, under our laws.

The Congress therefore set about the enactment of laws for their relief. They were foreign patentees or persons having patents for inventions already granted by foreign countries. They came to Congress asking an act of special grace for their relief, and Congress set about its legislation with that view, and clearly with no intent to impair or in any wise affect the rights and privileges of the other class —the domestic or home applicants—under the system

established for them. It was not necessary to do so for any of the purposes of the relief asked for by the foreign patentees; and no other class needed or called for the grace or comity.

The first act was passed in 1836. It provided that "Nothing in this act contained shall be construed to de- "prive an original and true inventor of the right to a "patent for his invention by reason of his having *previ- "ously* taken Letters Patent therefor in a foreign country, "and the same having been published at any time within "six months next preceding the filing of his specifications "and drawings."

This innovation had manifestly a single purpose. There was no intent in any degree to affect the rights of an original applicant for a patent in this country, and especially not to impair such rights as should accrue to him on the filing of his application. On the contrary, it intended to make a footing for a new class of applicants, that is to say, a class who "*previously*" to filing an application here, or to the filing of their "specifications and drawings" (to use the language of the statute which are equivalent words), had taken out Letters Patent in a foreign country, and had published the same at any time within six months next preceding the filing of the specifications and drawings in this country. It seems an absurdity to say that this section has any application whatever upon the rights of a domestic inventor who had filed his application under our laws, having then no foreign patent for his invention.

This provision let in a narrow class of foreign patentees, and it shows the caution with which Congress approached the subject, and the care taken not to affect domestic applicants for novel patents under our own system; and doubtless it tends to show that Congress meant to preserve *the time of application* as the point of time at from which the rights of applicants should be determined.

The next act was that of 1839. That act also has a single manifest purpose, to wit, to remove more broadly the barrier against foreign patentees. Up to that time all

such patentees who had obtained their foreign patents, except the narrow class who should file applications within a limited period, to wit, six months after taking out such patents in a foreign country and publishing the same, were still debarred from applying for patents here. This Act of 1839 so extended the grace, that no foreign patentee should be "*debarred*" because he had taken out his foreign patent more than six months prior to his application here, "provided that the same shall not have been introduced into public and common use in the United States *prior to the application* for such patent; and provided also that in all cases such patent shall be limited to the term of fourteen years from the date of publication of such foreign Letters Patent."

In this act also is seen the sedulous intention of Congress to keep prominent and preserve *the date of application here*, as a controlling point of time. The time of receiving the foreign patent is by this act made immaterial. The controlling circumstance is that the thing patented shall not have been introduced into public or common use in this country prior to the application here for a patent. The patent issued to such an applicant is limited to fourteen years from the date or publication of the foreign patent.

Nothing can be more manifest than that this act had no effect upon our domestic applications for non-patented inventions. Both classes stood and continued to stand upon different footings, each controlled as to its rights by the applications filed; nor can anything be plainer than that an American inventor who first filed his application for a domestic patent could not be affected or limited as to his rights to a patent here, if while his application was *sub judice* he sought also to protect his rights as first inventor in a foreign country, and succeeded by an earlier adjudication in obtaining a patent there. The language of the Act of 1839 could not in such a case be distorted to his prejudice, for most clearly it could not be applied to his application previously made, or to disturb the *status* thereby acquired.

The section is limited by the force of the words "such patent" twice repeated, and their immediate relation to the words "prior to the application," and the connection of that phrase with the preceding sentence to which it is a provisional exception.

The next Act is that of 1870 (sec. 25).

In this, also, the purpose of Congress seems manifest. It is to make further special provision for inventors who are foreign patentees, coming hither, *as such*, to make application for patents under our laws. They must come in under their *status as foreign patentees*, and can come in under no other. To give them rights under our laws it was thought neither necessary nor wise to do anything that should affect or prejudice the home inventor who has applied under the system applicable to his class, and whose application is *sub judice* as such. This section also has no aim other than to provide for and further regulate the rights which may be acquired by the patentees of foreign governments, who come here as such asking for the privilege to become patentees of the same invention, under our laws. They must show to our authorities their status of foreign patentees, as the prime ground of their application under this act. They must show also, not only the fact that they are such foreign patentees, but the time when they became such, and that their patented article has not been introduced by themselves or any one into public use in the United States for more than two years *prior to the application;* and on establishing these facts they may take a patent for the foreign patented invention which shall expire at the same time with the foreign patent, or if there be more than one such patent at the same time, with the one having the shortest term to run, but in no case to run more than seventeen years, which was then the ultimatum of our own patents.

Sec. 4887 of the Revised Statutes is a revision of the Act of 1870 (sec. 25), with changes of verbiage doubtless intended to simplify the meaning of the section revised.

It is now the controlling statute; but it is to be considered in the light of the preceding acts with which it is

in *p ri materia*. In considering this section, it is not to be forgotten that the purpose of all these enactments was not to legislate for or against domestic inventors who apply in the first instance under the pre-established system of this country for the protection of inventions seeking first patents here, but to enact a system of privileges, conditions and limitations under which foreign inventors who have already taken patents abroad can come in as such and secure the protection of patents granted under our laws. No language of an act properly applicable to such a subject and purpose, however general in its forms of expression, should be imported into former general laws affecting other classes, merely because its general form of expression might, if so imported, be applicable in form to such classes.

Great injustice might result from adopting such a rule of construction, and courts will not do so unless constrained by clearly manifest legislative intent.

On the contrary, such general language should be limited to the specific intent, especially when the act has the manifest purpose to bestow privileges upon a class who cannot take them under the general laws, nor take them at all except under the conditions and restrictions imposed by the act plainly adapted to apply to such patents as the section permits to be granted.

Now, it cannot be doubted that sec. 25 of the Act of 1870, and sec. 4887 of the Revised Statutes, have their *primum mobile* altogether in the removing of the bar against the granting of a patent under our laws to a person who has "first patented or caused to be patented in a foreign country" the invention which he makes application to have patented in this country, and to provide that such patented invention, "unless the same has been in-"troduced into public use in the United States for more "than two years *prior to the application*," may be patented here; but it was not the intent to do this without limitations and restrictions which are to apply to every "such patent." These restrictions are peculiarly adapted to the cases specially provided for

by the section ; and those cases were precisely within the purview of the legislative intention. The statute itself is satisfied when they be so applied ; because such application covers all of the cases in the contemplation of the previous provisions of the section, to wit, the class of *foreign patentees who make applications as such to get American patents for their inventions already patented abroad.*

In the ~~final~~ first clause of sec. 4887 no other person, patentee or applicant, is described expressly or impliedly but such as would be debarred because of having received a patent in a foreign country, and who now come here relying on such patent, and showing that the same has not been "*introduced into public use in the United States for more than two years prior to the* APPLICATION." On behalf of such an applicant the act says to the official having authority, "Give him his patent, unless the same has been introduced, &c.," *but* every patent so granted shall be limited as prescribed by this act ; that is, every patent granted under this act upon such an application shall be so limited by the foreign patent or patents, of the applicant who comes seeking the privilege of this act, to the period of enjoyment granted by his foreign patent.

The word "But," which commences the second sentence of section 4887, is a word of exception, and is designed to manifest an intent to take away something that the previous sentence would otherwise have granted. That is a proper and normal use of the word. When so used it operates to detract from the right given, or to add some additional restriction or limitation upon its effect. That word is substituted by the Revisers for the word "*provided,*" used in section 25 of the Act of 1870, which in that section is to be repeated in order clearly to discern the intention,—" provided the same shall not have been introduced into public use in the United States for more than two years prior to the application for such patent;" so that it shall read " *and (provided) that the patent shall expire* at the same time with the foreign patent," &c.

The word "provided," and the word " But," clearly indicate the limitation of the enjoyment of the patent to be

granted, and are referable to the patents provided for in the preceding paragraphs; and they operate to make the section say "take your patent as a foreign patentee, but take it with your time of enjoyment limited by your foreign patent. The language of the sections (25 and 4887) seems to leave no room for doubt that the intended limitation was meant only to apply to cases of applications by foreign patentees, coming hither as such, to seek the conditional rights and privileges in respect of which these statutes have taken away the barrier; and that there was no occasion for general legislation beyond what was needed by such an applicant to enable him to enjoy his restricted privileges. The intention is to be measured by the occasion. And the fact that Congress uses words of exception or diminution in defining the limitations, shows clearly that they were not designed to include the applications of domestic inventors.

It seems incredible that Congress could have intended that these enactments should operate upon or affect such an application for a patent as that of Mr. Bate. He was an American inventor. He had no patent from any foreign country; nor had made any application for one. He first brought his application into the Patent Office in due form as a domestic inventor applying under the laws of his own country, and containing every allegation necessary, if true, to establish his right to the enjoyment of the privileges of an inventor first patented by the United States. These facts settled his status as an American inventor filing his application under the laws of his own country. He could not aver in his application the facts which a foreign patentee must allege, for no such facts existed. The facts he did allege established his status as an American inventor claiming his first patent under American laws. But the usual delays ensued and an "interference" which involved litigation was filed and caused greater delay. But these incidents did not change his legal rights, which depended only on his success in establishing the truth of the averments of his application; which rights always related to the time of filing his application. It is

a rule, strengthened by some rare exceptions, that in judicial or quasi judicial proceedings the rights of a claimant are governed by the facts existing at the making or exhibition of his claim.

If the several acts for the relief of foreign patentees had never been enacted, Mr. Bate's application as an American inventor could not have been defeated by showing that his subsequent application in Canada had first ripened into a patent; because his established *status* under his first application here would, by relation, uphold his right to the American patent as an inventor of the date when his application was filed. The legislation now under consideration did not step in to meet such an exigency, and, while graciously conferring favors on foreign patentees who could show themselves within its conditions, impose severe penalties on domestic patentees whose rights had accrued under a domestic application, which no such foreign patentee could have made. Our laws have never shown an intent to prevent an American patentee from protecting his invention by patents in foreign countries.

They have left him free to get all the enjoyment and protection he can under such patents after securing his rights by his application first made in this country as a domestic patentee.

It would indeed have been a harsh bill that had directly proposed that an American applicant for a patent in his own country should loose his rights as such if while his application was pending and in controversy here he applied for and obtained a patent in a foreign country. Such a bill could not have become a law—for in many instances it would work immense injustice.

Such a construction of laws designed for another purpose should not be accepted by the courts except upon imperative necessity.

The established rules of procedure by the Patent Office completely accorded with our construction of these acts. The foreign patentee must come in, if at all, on the basis of his foreign patent; he must show himself to be outside of the conditions of the act; he must show his foreign

patent or patents, and if more than one showing date and terms; and receive his new patent with the limitations prescribed by the act. And in all things then and thereafter he must stand as a foreign patentee whose invention has been repatented in this country.

While the domestic applicant was held (before the decision under review) to stand as to all his rights upon the status of his application unprejudiced by a patent granted him for the same invention while pursuing his rights under his prior American application. This, it seems to us, is what the law ought to be; what Congress intended it to be; and nothing but a mistaken application of the letter of the act, in cases not within its spirit, can construe it to be otherwise. Our opponents stand upon the letter of the act, insisting upon its stringent application to a case not within its spirit. But they fail to show any declaration by Congress that these acts shall apply, not only to foreign patentees who apply as such for the special grace of the acts, but also to domestic applicants who have applications as such for domestic patents, and have found themselves, by official delay in acting upon their applications, the grantees of a foreign patent. There is nothing in the law to declare such an applicant subject to so severe a penalty as a forfeiture of all his rights as an *American applicant*.

II.

But if it shall be thought by the Court that section 4887 is applicable to a patent granted to an American applicant, situate as was Mr. Bate, then a question arises as to the extent of the limitation in his case.

The language of the section that can be applicable to his patent is the following:

"But, every patent granted for an invention which has been previously patented in a foreign country shall be so

limited as to expire at the same time with the foreign patent."

As he had but one foreign patent, to wit, that granted in Canada, there is nothing for the residue of this provision to be applied to.

Now, the clear intent of this provision is, that the right of enjoyment of protection in this country under its patent shall be only that which can be held and used in the foreign country under its patent. The language of the section is, "shall be so limited as to *expire* at the same time with the foreign patent." The true inquiry is, when does the right of enjoyment under the Canadian patent "*expire*." To expire is to die. The Canadian patent was never dead.

A patent, no matter what its form may be, is to be read with the statute under which it is granted, as though the statute were therein embodied; for the rights granted, being purely statutory, cannot be different from those the statute creates, and they must be measured by the statute.

So reading the patent with the laws of Canada in this case, it is apparent that the patent to Mr. Bate did not *expire* at the end of five years from its date because the exigency which under those laws would cause it to expire never occurred. It was an instrument capable of renewal for a period of fifteen years in the whole, at the option of the patentee to be exercised as prescribed by law.

Such an instrument does not expire so long as the right of renewal exists and continues.

It is analogous to a lease of land for a term, with express right of renewal for another term, at the option of the lessee. The first *term* would expire by lapse of time, but the lease survives if renewed (at or before the time for renewal) and its covenants and the rights of enjoyment under them continue as though the original lease had embraced the whole period from its first execution.

Now, in a case where the whole object of an act is that the rights of enjoyment in the two countries of the privileges granted shall proceed *pari passu* and both terminate at the same time, the inquiry is not when by possibility

the right under the governing patent may expire, but when must the right expire. If the party affected by both has the option of renewal, and exercises it (as in this case was done before the end of five years), there is no sound principle that can hold that the renewed patent has expired when in point both of fact and of law it is continuing with all its original vigor.

In this case an American patent was issued to Bate for seventeen years (rightfully as we claim). His Canadian patent issued in form for five years with a vested right of renewal of which he was not and could not lawfully be deprived. In due season he called for and received the renewal on complying with all the conditions. His renewal put his patent in such condition, both of fact and of law, that it could not expire at all till the end of the renewed term. Yet it is claimed that there is some *virus* in section 4887 that kills the patent granted here for seventeen years, though it could not and did not affect the enjoyment of the Canadian patent for the whole period of renewal.

The provision of the section that if there be more than one at the same time the patent shall expire with the one having the shortest term, can have no different affect upon this question. It limits the question of inquiry where several patents exists to the shortest period of enjoyment. It relates to a case where there are several from different countries—under different laws for different periods; but it don't change the nature of the inquiry: which is, what rights of enjoyment are granted?

It certainly was not the intention of our statute, where all grants of patents are for seventeen years, to say that a renewal of a patent for a period within that maximum is of no value, so far as our patent is concerned, because ours is extinguished by the letter of the foreign patent, though the law enables that to be kept in primal vigor for many years longer.

To illustrate our views further: Suppose the foreign patentee does not make his application till after his patent is renewed under the law of Canada and is thereby in

continuous life, can he take any patent here or are all his rights gone by the lapse of the first period, though he complies in all other respects with the statute? No! the inquiry of the Court would be, what are the rights of enjoyment existing—present and contingent—under this patent, and such renewals as have been and may be claimed as lawful rights, and accord to him the same period of enjoyment in this country as he still possesses in Canada, the former ceasing for any cause, the latter to cease?

This question is one, as has been clearly shown in the supplemental brief on the subject of the laws of Canada, dependent on the laws of that country.

And the only substantial question is, what rights of enjoyment did Bate possess under those laws present and potential within his own election when his American patent issued?

The act made his enjoyment of ~~one~~ our patent coequal with the enjoyment he then was lawfully entitled to take under his Canadian patent under the provisions of the laws of Canada.

To recapitulate: Under section 17 of the Canadian Patent Act (see Record, p. 40), the right to call for and receive an extension of five years was an absolute one, and Mr. Bate could not be deprived of this right.

It was a part of the property value of the patent itself. That right he did exercise before the end of the five years, and before the patent could have expired either by lapse of time or *laches*. This statutory provision being read with the patent, becomes a part of the measure of privileges granted. The moment the statutory right of extension was exercised it became legally impossible that the patent should or could expire at the end of five years from its date. It could not expire by lapse of time till the end of ten years from its date, or fifteen if another extension was claimed and granted.

The attaching of evidence of the extension to the patent was not the making of a new grant, but the mere furnishing of evidence that the original patent continued

in being unexpired for a further period of time, according to the laws under which it was issued. Now, in granting the American patent to Bate for seventeen years, the act (sec. 4887), if applicable, says, this period is so limited as to *expire* at the same time with your Canadian patent; that is to say, it brings into the transaction that patent for the purpose of limiting the enjoyment of privilege under the American patent by the time of enjoyment that may lawfully be had in Canada under the Canadian patent. The latter comes in with all its rights and incidents which are known to be governed by the laws of Canada. The legal effect is therefore to declare that such period of enjoyment as can be had under and by virtue of this patent under the laws of Canada may be enjoyed here, providing that period shall not extend beyond seventeen years. A strict construction by a literal reading of the patent itself, regardless of the rights it carries to the patentee by virtue of the laws of Canada, defeats the intent of Congress, which clearly is that the right of enjoyment here shall be identical and contemporaneous with that right in Canada up to, but not beyond seventeen years. If it were true that the letter killeth, the spirit maketh alive; but the letter does not kill, for the American right by the letter itself is only to expire when the foreign patent expires, and that cannot be said to expire while the law under which it was granted *keeps it alive* by such renewal of life as keeps the original patent in lawful and vigorous existence.

The question as against the American patentee is one of forfeiture. His patent is one by its terms for seventeen years; but it must be read, it is claimed, in connection with section 4887, and that imposes a loss or forfeiture of all enjoyment beyond the time when the foreign patent expires. The rule of strict construction in such cases, always applicable to forfeitures, requires an actual and not a possible expiration, and it looks to the question of fact in determining a loss of the right of enjoyment under the Canadian patent, and that right is not gone until it has ceased by the laws of Canada. This accords with the good

sense of the thing, for it is absurd to say that Congress meant to cut off the enjoyment of the patent in this country for any period in which it could be enjoyed under the laws of Canada, unless the period exceeded seventeen years.

Respectfully submitted,

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